Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, CALIFORNIA REPUBLICAN PARTY, LIBERTARIAN PARTY OF CALIFORNIA and PEACE AND FREEDOM PARTY, *et al.*,

Petitioners,

v.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA and CALIFORNIANS FOR AN OPEN PRIMARY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether California's new blanket primary law — which allows voters of any political affiliation to cross party lines at will and to participate in the selection of other parties' nominees — violates the First and Fourteenth Amendments to the United States Constitution.

Whether the associational rights of political parties are afforded less protection under the First Amendment than the associational rights of other private associations.

PARTIES TO THE PROCEEDING

Petitioners are the California Democratic Party, the California Republican Party, the Libertarian Party of California, the Peace and Freedom Party, Art Torres, Kathy Bowler, Paul Jorjorian, Gail Lightfoot, and C.T. Weber.

Respondents are Bill Jones, Secretary of State of California, and Californians for an Open Primary, as well as Michael Schroeder, Shawn Steel, and Donna Shalansky, who were plaintiffs/intervenors in the district court and appellants in the Ninth Circuit Court of Appeals.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	vii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
A. The Effect of Proposition 198 on California Partisan Primary Elections.	3
B. Proceedings Below	5
Reasons for Granting the Writ	7
I. The Decision Of The Court Of Appeals Conflicts With Decisions Of The Supreme Court And With Prior Decisions Of The Ninth Circuit.	7

Contents

	Page
II. The Questions Presented Are Important.	11
III. The Decision of the Court of Appeals Has a Particularly Debilitating Effect on California's Minor Parties.	15
Conclusion	16

TABLE OF CITED AUTHORITIES

	Page
Cases:	
Anderson v. Celebrezze, 460 U.S. 780 (1983)	12
Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604 (1996)	12
Democratic Party of United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (1981)	7, 14
Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989) 8, 9, 10, 14	
Jones v. McCollister, 159 Cal. App. 2d 708 (1958)	3
Lightfoot v. Eu, 964 F.2d 865 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993) 10, 11	
Nader v. Schaffer, 417 F. Supp. 837 (D. Conn. 1976), *aff'd*, 429 U.S. 989 (1976)	12
San Francisco County Democratic Cent. Committee v. Eu, 826 F.2d 814 (9th Cir. 1987), *aff'd sub nom., Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989)	11
Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) 7, 8, 9, 10, 14	
Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997)	6, 9

Cited Authorities

	Page
Statutes:	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	3
28 U.S.C. § 1343(a)(3)	3
CAL. ELEC. CODE § 2001	2
CAL. ELEC. CODE § 2107	3
CAL. ELEC. CODE § 2151	13
United States Constitution:	
First Amendment	i, 1, 2, 7, 9, 10
Fourteenth Amendment	i, 1, 2, 7
Other Authorities:	
California Proposition 198	2, 3, 4
Bone, *American Politics and the Party System* 507 (1949)	13
L. Friedman, "Reflections Upon the Law of Political Parties," 44 Cal. L. Rev. 65 (1956)	13
E.E. Schattschneider, *Party Government* (Rinehart 1942)	12

TABLE OF APPENDICES

	Page
Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed March 4, 1999	1a
Appendix B — Order And Amended Memorandum Of Opinion And Findings Of Fact And Conclusions Of Law Of The United States District Court For The Eastern District Of California Dated And Filed November 24, 1997	45a
Appendix C — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing Dated And Filed June 4, 1999	86a
Appendix D — Text Of Proposed Amendment To The Elections Code (Proposition 198)	89a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit opinion (App. A) is reported at *California Democratic Party v. Jones*, 169 F.3d 646 (9th Cir. 1999). The district court opinion (App. B) is reported at *California Democratic Party v. Jones*, 984 F. Supp. 1288 (E.D. Cal. 1997).

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on March 4, 1999. The Court of Appeals entered an order denying a timely petition for rehearing and petition for rehearing en banc on June 4, 1999 (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

The First Amendment states in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The full text of California's Proposition 198 is at App. D. The key provision of Proposition 198 is new California Elections Code section 2001, which states:

> All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote, except as otherwise provided by law, at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation.

STATEMENT OF THE CASE

In March 1996 California voters adopted a new primary election law that allows voters of any political affiliation to vote in any party's primary election for any elective office. Shortly thereafter petitioners (four political parties and

certain party officials) filed an action in federal district court seeking to enjoin respondent California Secretary of State from implementing the new law. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction) and under 28 U.S.C. § 1343(a)(3) (jurisdiction to redress deprivation of rights guaranteed by the United States Constitution). After a four-day trial, the district court entered judgment in favor of respondent Secretary of State. The court of appeals affirmed and later denied a petition for rehearing.

A. The Effect of Proposition 198 on California Partisan Primary Elections.

For about the first 50 years of California's existence as a state, nominations for public office were made at party conventions. Legislative attempts to regulate the nomination process were held to violate the California Constitution.[1] The California Constitution was amended in 1908 to permit the state legislature to provide for direct nomination of candidates by primary election. The Primary Election Law of 1909 created a closed primary[2] and California primaries remained closed until the adoption of Proposition 198. California law allows electors to register or reregister up to 29 days before an election.[3] Thus the effect of California's prior closed primary law was to require voters to decide which primary they wanted to vote in at least 29 days before the primary.

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1. *Jones v. McCollister*, 159 Cal. App. 2d 708, 711 (1958).

2. In a closed primary, only voters who are registered with a political party are allowed to vote in that party's primary. For example, only registered Democrats can choose Democratic nominees for the ensuing general election.

3. CAL. ELEC. CODE § 2107.

Proposition 198 is a statutory initiative adopted by California voters at the March 1996 primary election. Proposition 198 creates a blanket primary system in which every primary voter receives the same ballot. Thus a primary voter can vote for a Democrat for Governor, a Republican for United States Senator, a Libertarian for Attorney General, a Peace and Freedom candidate for California State Senator, etc. As far as the voter is concerned, party registration makes no difference at all — each voter receives the same ballot. However, as far as the political parties are concerned, the primary remains a partisan nominating process. Candidates are listed on the primary ballot according to their party affiliation and, if successful, become their party's "nominee." At the ensuing general election, a candidate "representing" each party will appear on the ballot.

The ballot argument in favor of Proposition 198 demonstrates that one goal of its proponents was ideological — to produce more "moderate" party nominees:

> It [the closed primary] favors the election of party hardliners, contributes to legislative gridlock, and stacks the deck against more moderate problem-solvers.

ER[4] 33 at 715.

By adopting Proposition 198, California joins three other states — Alaska, Louisiana, and Washington — that have blanket primary elections.

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4. "ER" refers to the Excerpts of Record filed in the Court of Appeals.

B. Proceedings Below

Petitioners are four California political parties from across the political spectrum. Two petitioners — California's Republican and Democratic parties — will be well known to the Court. The two others are small parties that require a short introduction. Petitioner Libertarian Party of California was formed in 1972 and opposes many existing forms of government regulation:

> [W]e oppose all interference by government in the areas of voluntary and contractual relations among individuals. People should not be forced to sacrifice their lives and property for the benefit of others. They should be left free by the government to deal with one another as free traders; and the resultant economic system, the only one compatible with the protection of individual rights, is the free market.

ER 20 at 588 [Libertarian Party Statement of Principles]. The Peace and Freedom Party was formed in 1968 to nominate a presidential candidate who would oppose United States involvement in Vietnam. In 1974 the party formally declared itself in support of socialism. ER 15 at 426 [Expert Report of Richard Winger]. Today the party platform advocates doubling the minimum wage, abolishing NAFTA and GATT, and guaranteeing self-determination for Puerto Rico and all United States territories. ER 30 at 702 [1996 Platform].

The district court conducted a four-day nonjury trial in the summer of 1997. The evidence put on by the political party petitioners all went to one basic point: The choosing of a nominee is inextricably linked to defining a party's

ideology. By inviting nonmembers to participate in the primary, Proposition 198 will allow outsiders to determine a party's ideology. A significant part of respondent Secretary of State's evidence went to establish the fact that Proposition 198 would in fact produce more moderate candidates. ER 6 at 204 [testimony of Professor David Olson]; ER 10 at 269-269A [testimony of Professor Elizabeth Gerber].

The district court awarded judgment to respondents. The district court stated that political parties are significantly regulated by the state and that the analogy between political parties and other private associations is therefore "imperfect at best." App. B at 65a. The court went on to find that "the blanket primary imposes a significant but not severe burden on [petitioners'] associational rights." App. B at 77a. Using the balancing test articulated by this Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), the district court concluded that this burden was justified by state interests advanced by Proposition 198, which it characterized as "enhanc[ing] the democratic nature of the election process and the representativeness of elected officials." App. B at 80a.

The Court of Appeals adopted the district court's opinion and affirmed the district court's judgment. App. A at 8a.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND WITH PRIOR DECISIONS OF THE NINTH CIRCUIT.

The court of appeals' holding that Proposition 198 imposes "a significant but not severe burden on [political parties'] associational rights" cannot be squared with Supreme Court precedent. *See* App. A at 37a.

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) is the case most directly on point. *Tashjian* concerned a situation almost the mirror image of that presented here. A state party adopted a rule opening its primary to unaffiliated voters, and then challenged a state law that required a closed primary. *Id.* at 212. This Court noted that "the right to associate with the political party of one's choice" is a freedom protected by the First and Fourteenth Amendments, and that "the freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.' " *Id.* at 214, *quoting Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981). The Connecticut closed primary law trenched on these associational rights by

> plac[ing] limits upon the group of registered voters whom the Party may invite to participate in the "basic function" of selecting the Party's candidates. The State thus limits the Party's

> associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.

Id. at 215-216 (internal citation omitted). Having reached that conclusion, the Court closely reviewed Connecticut's justifications for the closed primary law. Finding the proffered interests insubstantial, the Court held the closed primary statute unconstitutional as applied to the Connecticut Republican Party. *Id.* at 225.

Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989), concerned the validity of several provisions of the California Elections Code that: (1) prohibited preprimary endorsements by ballot-qualified political parties; (2) regulated the composition of the parties' governing bodies; (3) limited the term of office of party chairs; and (4) required that the chair rotate between residents of northern and southern California. The Supreme Court affirmed a judgment enjoining enforcement of all these statutes, stating:

> It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments. Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to "identify the people who constitute the association," and to select a "standard bearer who best represents the party's ideologies and preferences."

Id. at 224 (internal citations omitted).

This Court recently reaffirmed its holdings in *Tashjian* and *Eu*. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) upheld a Minnesota law barring fusion candidates.[5] However, *Timmons* stressed that "[t]he New Party's claim that it has a right to select its own candidate is uncontroversial, so far as it goes. . . . *That is, the New Party, and not someone else, has the right to select the New Party's 'standard bearer.'* " *Id.* at 1370 (internal citation omitted) (emphasis added). *Timmons* went on to state that "while *Tashjian* and *Eu* involved regulation of political parties' internal affairs and core associational activities, Minnesota's fusion ban does not." *Ibid.* Thus *Timmons* makes clear that *Tashjian* is still good law and that it stands for the proposition that a political party's choice of a nominee is a core associational activity that is protected by the First Amendment.

The decision below cannot be reconciled with *Tashjian*. There is nothing peculiar to California parties that would make them less entitled than Connecticut parties to protection of their associational rights "at the crucial juncture at which the appeal to common principles may be translated into concerted action[.]" *See Tashjian*, *supra*, 479 U.S. at 215-216. Nor is there anything peculiar to California about the numerous state interests allegedly served by the blanket primary. The court below noted that all these various interests boil down to one contention: The blanket primary will enhance the democratic nature of elections and the representativeness of public officials. App. A at 39a. Any state could and would make the same claim about any change to its primary system. Further, it would seem that the

5. Fusion is "the nomination by more than one political party of the same candidate for the same office in the same general election." *Id.* at 1367, n.1.

associational right asserted here is stronger than the right asserted in *Tashjian*. Petitioners in the present case seek to choose their own nominees; the Connecticut Republican Party sought to allow outsiders to join in the nomination process. The First Amendment protects the right of *the party* to choose its own standard bearers. *Eu*, *supra*, 489 U.S. at 224.

The decision below also conflicts with previous opinions of the Ninth Circuit. *Lightfoot v. Eu*, 964 F.2d 865, 870 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993), concerned a challenge to a California statute that prohibited successful primary write-in candidates from appearing on the subsequent general election ballot unless they received at least one percent of the total vote. The Libertarian Party challenged the statute on the ground that there was no voting district in California with a sufficient number of Libertarians to meet the one percent threshold, so a write-in candidate who won the Libertarian primary could never appear on the general election ballot. *Id.* at 869. The *Lightfoot* court upheld the state statute, stating that the Libertarian Party could exceed the one percent threshold in the future by opening its primary to non-Libertarians:

> The Libertarian Party could broaden the number of voters that participate in its primary by opening its currently closed primary to non-Libertarians, and the State could not prevent it from doing so. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986) (holding that state law requiring that voters in party primary be registered members of the party violates First Amendment right to freedom of association).

Id. at 870. *See also San Francisco County Democratic Cent. Committee v. Eu*, 826 F.2d 814, 831 (9th Cir. 1987), *aff'd sub nom., Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989) ("A party's survival depends upon its ability to compete in the free marketplace of political ideas and ideals. The First Amendment limits states to a neutral role in that competitive process. A state may not interfere with the associational rights of political parties beyond what is necessary to assure honest and orderly elections.")

The Libertarian Party has received conflicting messages from the Ninth Circuit. First, if the Libertarian Party wishes to adopt a rule opening its primary to non-Libertarians, that rule will prevail over conflicting state law.[6] *Lightfoot*, *supra*. Second, if the Libertarian Party wishes to adopt a rule closing its primary to non-Libertarians, the rule will not prevail over conflicting state law. App. A. There is no basis in the Constitution for this difference in results.

II. The Questions Presented Are Important.

The court below concluded that various state interests outweigh "the substantial interest that the political panties have in controlling who votes in the primary." App. A at 43a. Describing the parties' interest as "substantial" is something of an understatement. A political party has been aptly described as:

> a voluntary association, instituted for political purposes, with the goal of effectuating the will of its members. The party's ultimate goal, in the

6. The Libertarian Party does not wish to open its primary to non-Libertarians.

> electoral process, is to obtain control of the levers of government by winning elections, so that it may then put into operation its policies and philosophies. . . . In order to accomplish this goal, the party seeks to nominate those candidates who are most likely to win the general election, while remaining most faithful to the party's (i.e., its members') policies and philosophies. *The party's selection of its candidates therefore is an ultimate and crucial element of the party members' political activities.*

Nader v. Schaffer, 417 F. Supp. 837, 847 (D. Conn. 1976) (citations omitted, emphasis added), *aff'd*, 429 U.S. 989 (1976); *see also Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 629 (1996) (Kennedy, J., concurring and dissenting) (political parties "exist to advance their members' shared political beliefs," and "in the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa"); *Anderson v. Celebrezze*, 460 U.S. 780, 821 (1983) (Rehnquist, J., dissenting) ("Political parties have, or at least hope to have, a continuing existence, representing particular philosophies. Each party has an interest in finding the best candidate to advance its philosophy in each election"). As E. E. Schattschneider stated in his classic 1942 study of American parties, nominations are "the most important activity of the party. . . . If a party cannot make nominations it ceases to be a party . . . he who can make the nominations is the owner of the party." E.E. Schattschneider, *Party Government* (Rinehart 1942), quoted in ER 17 at 478.

The decision below was heavily influenced by the court of appeals' conclusion that "at least the major political parties lack the unity of purpose and cohesive membership characteristic of most private organizations." App. A at 26a. The court of appeals noted that voters who register in a party do not pay dues and do not take an oath, they simply sign a registration card. *Ibid.* However, it should be noted that parties are not restrictive about their membership because they are prohibited by law from being restrictive. California law allows any qualified voter to affiliate with a political party by signing a registration card.[7] Left to their own devices at an earlier point in this country's history, the parties were considerably more restrictive. Samuel Adams' description of a caucus meeting antedates the Revolution:

> This day learned that the Caucus Club meets at certain times in the garret of Tom Dawes, the Adjutant of the Boston Regulars. He has a large house . . . and the whole club meets in one room. There they smoke tobacco till you cannot see from one end of the garret to the other. There they drink flip I suppose and they choose a moderator who puts questions to the vote regularly; and selectmen, assessors, collectors, fierwards, and representatives are regularly chosen before they are chosen in town. . . .

Bone, *American Politics and the Party System* 507 (1949); quoted in L. Friedman, "Reflections Upon the Law of Political Parties," 44 Cal. L. Rev. 65 (1956). Abuses of the caucus system led to Progressive Era reforms and eventually to the current registration system which makes it very easy

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7. CAL. ELEC. CODE § 2151.

for a voter to affiliate with a party. But a new Draconian restriction of party rights (the blanket primary) cannot be justified by pointing out that party rights are already limited in some respects. This approach would legitimate a complete extinction of party associational rights, so long as the extinction were accomplished incrementally.

While the court below was correct to note that the American experience has required accommodation between party associational rights and state power to regulate the election process, the decision below results in capitulation, not accommodation. The blanket primary is the nominating process most intrusive into party associational rights because it denies the very existence of those rights. If a party's First Amendment right to "choose the standard bearer of its choice" does not protect it from a blanket primary, that right is little more than a mirage. *See Eu, supra*, 489 U.S. at 224.

Finally, it is more than a little disturbing that Proposition 198 has been promoted and defended as producing more moderate candidates. To borrow respondents' antiseptic phraseology from the proceedings below, under the blanket primary, nominees will "stand closer to the median policy positions of their districts[.]" Appellee's and Intervenor's Brief [6/25/98] at 51. This Court has stated more than once that as to the question of what is in a party's best interests, "a State, or a court, may not constitutionally substitute its own judgment for that of the Party." *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 123-124 (1981); *Tashjian, supra*, 479 U.S. at 222-224; *Eu, supra*, 489 U.S. at 227-228. Likewise, as to ideology, a State may not constitutionally substitute its judgment for that of a party.

III. The Decision of the Court of Appeals Has a Particularly Debilitating Effect on California's Minor Parties.

The blanket primary will be most debilitating to California's Peace and Freedom and Libertarian parties, and to other minor parties. These parties are explicitly ideological. They have decided that winning elections in the short run is less important than adhering to a deep-seated ideology and hoping to win public support in the long run. Both parties have a registration of under one percent of the total electorate. The blanket primary will allow the other ninety-nine percent of the electorate to join in the nominating process, flooding future Peace and Freedom and Libertarian primaries with voters who know nothing about these parties and who do not share their ideology. In the most fundamental way, the blanket primary will deny minor party members the right to choose their own nominees.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED MARCH 4, 1999

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CALIFORNIA DEMOCRATIC PARTY; ART TORRES; KATHY BOWLER; PAUL JORJORIAN; PEACE AND FREEDOM PARTY; C.T. WEBER; LIBERTARIAN PARTY OF CALIFORNIA; GAIL LIGHTFOOT,

Plaintiffs-Appellants,

and

CALIFORNIA REPUBLICAN PARTY, MICHAEL SCHROEDER; SHAWN STEEL; DONNA SHALANSKY,

Plaintiffs-Intervenors,

v.

BILL JONES, Secretary of the State of California,

Defendant-Appellee,

v.

CALIFORNIANS FOR AN OPEN PRIMARY,

Defendant-Intervenor-Appellee.

No. 97-17440

D.C. No. CV-96-02038-DFL

OPINION

CALIFORNIA DEMOCRATIC PARTY; ART TORRES; KATHY BOWLER; PAUL JORJORIAN; PEACE AND FREEDOM PARTY; C.T. WEBER; LIBERTARIAN PARTY OF CALIFORNIA; GAIL LIGHTFOOT,

Plaintiffs,

and

CALIFORNIA REPUBLICAN PARTY, MICHAEL SCHROEDER; SHAWN STEEL; DONNA SHALANSKY,

Plaintiffs-Intervenors-Appellants,

v.

BILL JONES, Secretary of the State of California,

Defendant-Appellee.

No. 97-17442

D.C. No. CV-96-02038-DFL

Appeals from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
October 7, 1998—San Francisco, California

Filed March 4, 1999

Before: Procter Hug, Jr., Chief Judge, Betty B. Fletcher and Stephen S. Trott, Circuit Judges.

Opinion by Judge B. Fletcher

SUMMARY

Government Law/Elections

The court of appeals affirmed a judgment of the district court. The court held that a state initiative measure that converts a closed primary election to an open or "blanket" form does not violate the First Amendment associational rights of political parties or their officials.

In 1996, California voters adopted Proposition 198 and established the Open Primary Act, which converted the State's primary election from closed to an open or "blanket" primary: voters can vote for any candidate regardless of the candidate's or the voter's party affiliation. Appellant California Democratic Party and other political parties and officials sued appellee California Secretary of State, alleging that Proposition 198 violated their First Amendment right of association.

The district court ruled that the burdens imposed on the plaintiffs' associational rights by Proposition 198 were not sufficient to render the Open Primary Act unconstitutional, and were outweighed by compelling interests of the State and its electorate. The parties and party officials appealed.

[1] The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. As a result, political parties' government, structure, and activities enjoy constitutional protection. However, the states also have a strong interest in the conduct of elections that is matched by state control over the election process for state offices.

[2] The Supreme Court has never directly considered the constitutionality of a blanket or open primary. Two state supreme courts have concluded that a blanket primary withstands a party's First Amendment challenge.

[3] In evaluating the constitutionality of Proposition 198, it was necessary to determine the character and magnitude of the burdens imposed on the associational rights of the political parties, and then consider the state's interests against the burden. The greater the intrusion, the greater had to be the State's interests and the more narrowly tailored Proposition 198 had to be to advance them.

[4] The parties contended that their interest in limiting candidate selection to their own members is so great that no matter what the State's interest and no matter how Proposition 198 will work, the blanket primary was unconstitutional on its face. While the interest in determining who will vote in a primary is protected by the First Amendment, this was not the end of the inquiry. If it were, open primaries would also be unconstitutional on any party's objection: an open primary permits voters who are not registered in a party to vote in that party's primary. But many states have some version of an open primary, and to invalidate them on this ground would be an extraordinary intrusion into state election laws, and would remove from the American political system a method for candidate selection that may states consider beneficial, and which could take on new appeal and importance.

[5] Were the parties' power to determine membership and to select their nominees unfettered, the states would lack power to prescribe candidate selection through a primary election, or to require that all voters who have met a state's registration requirements be permitted to vote in the parties' primaries notwithstanding any other membership requirement a party might impose. However, states have considerable regulatory authority over the process of candidate selection, and may require that parties select their candidates by a primary election open to registered voters. The state's power over political parties stems from the Constitution and from the public functions the parties perform in the candidate-nominating and political processes.

[6] The parties contended that a blanket primary process would have a destructive effect on all political parties, that there would be widespread cross-over voting, and that the consequences will be many and adverse to the parties. [7] A cross-over voter is one who votes for a candidate of a party in which the voter is not registered.

[8] The evidence suggested that cross-over voting will be more prevalent after Proposition 198. Nonetheless, the parties' characterization of the likely amount or effects of cross-over voting due to a blanket primary was overdrawn.

[9] Although cross-over voting typically does not change the outcome of a primary and may not be much greater in a blanket than in a closed primary, it is probable there will be elections under Proposition 198 that will be decided by the cross-over vote. [10] Furthermore, the possibility of a decisive cross-over vote could affect the conduct of elections and election officials. Candidates will perceive a need or opportunity to attract support from the entire electorate. This will affect the cost of the primary and may affect the positions candidates take on issues. Once elected, candidates may perceive that the cross-over vote makes them less vulnerable at the primary to the party organization or party regulars. The corollary is a loss of power to party activists.

[11] The parties contended that their governing bodies may be adulterated, and that their national organizations may not accept the results of the California presidential primary if it is a blanket primary. However, these contentions were not particularly forceful. The California parties could be forced to adopt a different procedure for delegate selection other than the presidential primary, or they could receive a waiver from their national organizations.

[12] The magnitude of the burdens imposed on the parties by Proposition 198 was not either "severe" or "negligible." State law requires each party to select its candidate through a

primary, and the winner of a primary will be the party's nominee. The blanket primary wrests a measure of control of the primary process from the party and its members. This is its purpose. By permitting non-party members to vote in a party's primary, Proposition 198 is an intrusion on a party's right to select its own candidate.

[13] On the other hand, the burdens on the parties due to Proposition 198 were not likely to prove severe or debilitating. Proposition 198 would not diminish the efficacy or strength of political parties in California to any substantial degree. The parties did not show that the blanket primary is significantly different from the closed primary, or contend that Proposition 198 had any discriminatory purpose or effect. The burden of a blanket primary falls evenly on all parties. Proposition 198 left untouched the wide field of party endeavor that is not directed specifically to the primary, such as developing the platform, registering voters, and getting out the vote.

[14] In light of all these considerations, the parties showed that the blanket primary imposes a significant but not severe burden on their association rights. To survive the challenge, Proposition 198 had to be supported by interests that were sufficient to outweigh the burdens. Those interests did not have to be compelling, given that the burdens were not crushing, but they had to be important.

[15] The states have broad regulatory authority over the conduct of elections, including primaries. **[16]** The state interests furthered by Proposition 198 all reduced to one fundamental contention: Proposition 198 enhanced the democratic nature of the election process and the representatives of elected officials.

[17] A blanket primary opens the candidate-selection process to two types of arguably "disenfranchised" voters—independents and minority party voters in safe districts. In a

blanket primary, independent voters will be able to participate in framing the choice that they will have to make in the general election.

[18] Taken as a whole, the State's interests that supported the blanket primary were substantial, indeed compelling. There is a substantial state interest in encouraging compromise and political stability, in attempting to ensure that the election winner will represent a majority of the community. Increasing the representatives of elected officials, giving voters a greater choice, and increasing voter turnout and participation in the primary process are all interests of the first order. The voters' belief in the fairness of the electoral process is also a substantial state interest. It was apparent that California voters believed that the system is fairer when all voters participate in framing the choice of candidates at the general election. These interests outweighed the interest political parties had in controlling who votes in the primary.

COUNSEL

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John E. Mueller, Nielsen, Merksamer, Parrinello, Mueller & Naylor, Mill Valley, California, for the intervenors-plaintiffs-appellants.

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Appendix A

OPINION

B. FLETCHER, Circuit Judge:

In 1996 California voters passed Proposition 198, which converted the State's primary election from a closed to a blanket primary in which voters may vote for any candidate regardless of the voter's or candidate's party affiliation. Appellants, the California Democratic, Republican, Libertarian, and Peace and Freedom Parties, together with other individuals, opponents of Proposition 198, seek reversal of the district court's judgment upholding its constitutionality. *California Democratic Party v. Jones*, 984 F. Supp. 1288 (E.D. Cal. 1997). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

STANDARD OF REVIEW

We review the constitutionality of a statute de novo. *Crawford v. Lungren*, 96 F.3d 380, 384 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1249 (1997). A district court's determinations on questions of law and on mixed questions of law and fact that implicate constitutional rights are also reviewed de novo. *Neal v. Shimoda*, 131 F.3d 818, 823 (9th Cir. 1997); *Jacobsen v. United States Postal Serv.*, 993 F.2d 649, 653 (9th Cir. 1992). We have undertaken that review.

CONCLUSION

We have reviewed the briefs to this court, the record made before the district court, and the careful, detailed, and eloquent opinion of the district court. Because we concur in it in every respect, we have elected to adopt it as the opinion of our court. We attach it as an appendix. It also may be found at 984 F. Supp. 1288 (E.D. Cal. 1997) *sub nom. California Democratic Party v. Jones*. The judgment of the district court is AFFIRMED.

Appendix A

APPENDIX

CALIFORNIA DEMOCRATIC PARTY, Art Torres, Kathy Bowler, Paul Jorjorian, Peace and Freedom Party, C.T. Weber, Libertarian Party of California and Gail Lightfoot, Plaintiffs,

v.

Bill JONES, Secretary of State of the State of California, Defendant.

California Republican Party, Michael Schroeder, Shawn Steel and Donna Shalansky, Intervenors/Plaintiffs,

Californians for an Open Primary, Intervenor/Defendant.

No. CIV. S-96-2038 DFL.

United States District Court, E.D. California.

Nov. 17, 1997.

As Corrected Nov. 24, 1997.

MEMORANDUM OF OPINION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

LEVI, District Judge.

In March of 1996, the people of the State of California, by a wide margin, adopted Proposition 198, an initiative statute known as the Open Primary Act. Proposition 198 converts the State's primary election from a closed to an open or blanket primary in which voters may vote for any candidate regardless of the candidate's or the voter's party affiliation. In a blanket primary under Proposition 198, one ballot will be prepared at the primary election for all voters just as in the general election. Because a blanket primary permits voters to vote in the primary election of a party without being registered in that party, the political parties and party officials who bring this action contend that Proposition 198 violates their right of

association guaranteed by the First Amendment of the Constitution.

The court concludes that Proposition 198 withstands this constitutional challenge.

I.

Under Proposition 198 "All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote ... at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation." [FN1] By this language and the conforming amendments to the State Election Code, Proposition 198 changed the California primary from a closed to an open or blanket system. [FN2] As the Legislative Analyst explained in the ballot pamphlet distributed to voters before the election, under the closed system "[i]n order to vote in primary elections for partisan offices, a voter must have identified a political party affiliation when registering to vote and can vote only for candidates of that party." Defs.' Ex. A at 5. Thus, for example, in the closed primary a registered Democratic Party voter receives a ballot that includes only candidates competing for the Democratic Party nomination. Only registered Democrats could vote for these candidates, and the winner of the primary would be the Democratic Party's candidate at the general election. [FN3] By contrast, the Legislative Analyst explained, in the blanket primary instituted by Proposition 198:

> FN1. Proposition 198 added to the Election Code the language quoted in text as a new § 2001. The Proposition also made conforming amendments to §§ 2151, 13102, 13203, 13206, 13230, 13300, 13301, and 13302. See Defs.' Ex. A.
>
> FN2. California has had a closed primary since 1909 when the State substituted direct nomination of candi-

> dates by primary elections in place of nominating conventions held by the political parties. In 1900 California briefly experimented with a blanket primary, but the California Supreme Court held it unconstitutional under the State Constitution. See Britton v. Board of Election Comm'rs, 129 Cal. 337, 346-47, 61 P. 1115 (1900). No claim is made under the State Constitution in the present case.
>
> FN3. Cal. Elec.Code § 15451 provides: "The person who receives the highest number of votes at a primary election as the candidate of a political party for nomination to an office is the nominee of that party at the ensuing general election."

> [A]ll persons who are entitled to vote in primary elections, including those not affiliated with a political party [are allowed to] vote for any candidate regardless of the candidate's political party affiliation. Thus, voters in primary elections would be allowed to vote for candidates across political party lines. Furthermore, the initiative provides that county elections officials prepare only one ballot for all voters. The candidates for an office would be listed randomly on the ballot and not grouped by political party affiliation. The candidate of each political party who receives the most votes for a state elective office becomes the nominee of that party at the next general election.

Defs.' Ex. A at 5. Therefore, in the blanket primary after Proposition 198, a registered Democratic Party voter, for example, could vote for a Republican Party candidate for Governor and a Democratic Party candidate for Assembly, and so on down the ballot. An independent voter could do the same. [FN4] Through such cross-over voting, it is possible under the blanket primary for independent voters and voters registered in one party to participate in the primary election of another party.

FN4. The election of political party committee members is not affected by Proposition 198. As to these party offices, voters may only vote for candidates of their own party registration.

In the statement of support included in the ballot pamphlet, proponents of Proposition 198 argued that the closed primary "favors the election of party hard-liners, contributes to legislative gridlock, and stacks the deck against more moderate problem-solvers." The open primary would permit voters to vote "for the best candidate for each office, regardless of party affiliation" thereby giving voters greater choice. In addition, according to proponents, the blanket primary would increase voter participation in the primary election, restore healthy competition particularly in "safe" legislative districts in which one party clearly dominates, make elected officials more responsive to voters as opposed to party officials, reduce the power of special interest groups, and strengthen the political parties by assuring the nomination of candidates with broader bases of support. Opponents of Proposition 198 contended that it would work an unconstitutional interference with the right of the parties to choose their nominees: "Allowing members of one party a large voice in choosing another party's nominee—which Proposition 198 would do—is like letting UCLA's football team choose USC's head coach!" [FN5] According to the opponents, the existing closed primary provided a "real choice" among candidates of different parties while a blanket primary would be "an invitation to political mischief" by special interests and political consultants. Defs.' Ex. A at 6-7. [FN6]

FN5. "Should Democrats be allowed to nominate Republican candidates for office? No! Should Republicans be allowed to nominate Democratic candidates for office? No!" Defs.' Ex. A at 7.

FN6. In light of the arguments for and against presented in the ballot pamphlet, it cannot fairly be argued

that the voters were misled or inadequately advised as to the effects and purposes of Proposition 198. Compare Jones v. Bates, 127 F.3d 839 (9th Cir.1997), reh'g granted, 129 F.3d 494 (1997) (majority of panel concludes that voters were not adequately advised as to effect of Proposition 140, the term limit initiative).

At the election, Proposition 198 was adopted by a convincing margin of those voting—59.51 percent (3,340,642 votes) to 40.49 percent (2,273,064 votes). According to reliable exit polls, Proposition 198 was supported by 61 percent of Democrats, 57 percent of Republicans, and 69 percent of Independents. The measure was supported by a majority of every demographic subgroup, including groupings by sex, age, race, education, political ideology, income, religion and party identification. Defs.' Exs. B & D. Proposition 198 commanded majorities in every county in California and in 75 of the 80 Assembly districts. Defs.' Ex. I. Although the turnout by California's six minor parties was too small to sample, given the broad public support for Proposition 198 among all groups of every sort, it is likely that a majority of the members of these parties also favored the initiative. R.T. at 847 (Testimony of Thomas Quinn). Moreover, the vote on Proposition 198 reflects the long-standing support for an open primary among California voters. According to Mervin Field, an eminent California political polling expert, Californians have favored an open primary by wide margins since at least 1983. See Defs.' Exs. L-2 & L-5. [FN7]

FN7. Mervin Field testified at the trial to his conclusion that as to Proposition 198 "there was remarkable consistency over a 13-year period, and that when the vote on Prop 198 was in, comparing that with the study that we did then 13 years prior, it showed that this concept, as it's posed here, and as it was posed in 198, struck a deep-seated chord with the voting public." R.T. at 645.

Appendix A

By passing Proposition 198, California joined a small group of states, consisting of Alaska, Louisiana, and Washington, who also have blanket or nonpartisan primary elections. The other states have either a closed or an open primary, or some variant of the closed or open primary. [FN8] In the classic closed primary, such as California had prior to Proposition 198, participation in a party's primary election is limited to voters who have registered as members of that party a specified period of time prior to the primary election. Fifteen states have closed primaries of this kind. See Defs.' Ex. E, Gerber Report, at 2-4. Eight additional states have a "semi-closed" primary: participation in a party's primary is limited to those who have registered as party members and independents. Id. Participation of registered members of other parties is not permitted.

> FN8. "The distinctions between open and closed primaries are easy to exaggerate. Too simple a distinction ignores the range of nuances and varieties within the closed primary states." F. Sorauf, Party Politics in America 206 (4th ed.1980), quoted in Democratic Party of United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107, 133 n. 8, 101 S.Ct. 1010, 1025 n. 8, 67 L.Ed.2d 82 (1981) (Powell, J., dissenting). Similarly, there are many variations within the open and blanket primary states.

In an open primary, a registered voter may request, on election day, the ballot for any party's primary in which the voter intends to vote, whether or not the voter previously has registered as a member of that party; however, the voter may only vote in one party's primary election. Twenty-one states have an open primary in this sense of the term. Id. [FN9] Finally, four states have blanket or nonpartisan primaries. The blanket primary is a version of the open primary in which the voter is not limited to the ballot of any single party. All voters receive the same ballot, and a voter is not limited to the candidates of any single party but may vote, as to each office con-

Appendix A

tested, for any candidate regardless of party affiliation. This is the primary system in Washington and Alaska, and is the system adopted by Proposition 198. Alaska first adopted a blanket primary in 1947 and has had a blanket primary since that time with the exception of the period from 1960 to 1966 when it adopted a traditional open primary. Washington has had a blanket primary continuously since 1935. Finally, Louisiana has a version of a blanket primary, a nonpartisan primary open to all registered voters. Similar to the blanket primary in the sense that a voter can vote for any candidate without regard to party affiliation and is not limited to one party's nominees, the nonpartisan primary differs because "[t]he two top vote receivers, regardless of party, meet in a subsequent (runoff or general) election." Id. at 3.

> FN9. The open primary is sometimes defined more narrowly to include only those primaries in which the " 'voter is not required to declare publicly a party preference or to have that preference publicly recorded.' " Democratic Party of United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107, 112 n. 4, 101 S.Ct. 1010, 1014 n. 4, 67 L.Ed.2d 82 (1981) (citation omitted). Approximately ten states have this kind of open primary. See Pls.' Ex. 7, Costantini Report at 3; Tashjian v. Republican Party of Conn., 479 U.S. 208, 222 n. 11, 107 S.Ct. 544, 552 n. 11, 93 L.Ed.2d 514 (1986). The other states follow practices that are sometimes classified as "semi-open" or "semi-closed." In these states the voter is permitted to request any party's ballot the day of the primary, but some record of the request is made or a public statement of party affiliation is made prior to voting.

"The relative merits of closed and open primaries have been the subject of substantial debate since the beginning of this century and no consensus has as yet emerged." Tashjian v. Republican Party of Conn., 479 U.S. 208, 222, 107 S.Ct. 544, 552, 93 L.Ed.2d 514 (1986). It is apparent from this very

case that the States continue to debate the question and to try new approaches. [FN10]

FN10. When the Supreme Court decided Tashjian in 1986 it found that 21 states provided for the classic closed primary. According to Professor Gerber, as of 1990 the number of closed primaries had fallen to sixteen, including California. See Defs.' Ex. E., Gerber Report, at 2. Because it is not easy to classify the differing systems and because analysts use somewhat different definitions of the "closed" and "open" primaries, this change in numbers may be more the product of differing classification systems than changes in the states' election laws. The Tashjian Court also found that four states, including Virginia, had blanket primaries. The inclusion of Virginia as a blanket state appears to have been in error. See Va.Code § 24.1-182 ("No person shall vote for the candidates of more than one party.").

All of the four political party plaintiffs in this case have bylaws that prohibit persons who are not registered in their parties from voting in their parties' primary. Article X, § 8 of the By-Laws & Rules of the California Democratic Party states that "No person shall be entitled to vote for a Democratic candidate at a partisan primary election unless he or she is a registered Democrat." Pls.' Ex. 1 at 36. The Republican Party also disputes the legitimacy of an open or blanket primary: "The [State Central] Committee shall recognize only those partisan nomination processes under California law that limit the electorate for partisan nomination elections to registered Republican voters, and which do not impose upon the Committee, without its express concurrence, a nomination process open to voters registered in other parties or as decline to state." Defs.' Ex. S at 2. The Peace & Freedom Party State Central Committee By-Laws and the Libertarian Party of California Bylaws have similar provisions. See Pls.' Ex. 3 at 6, and Ex. 4 at 13. [FN11]

FN11. The Democratic National Committee's charter requires that state party delegates to the national convention be chosen through "processes which ... restrict participation to Democrats only." Pls.' Ex. 2 at 2 (Art. 2, § 4(e)). See also Pls.' Ex. 9 at 4 (Rules 2.A. and 2.B. of the Delegate Selection Rules). The Rules of the Republican Party have a similar rule against blanket and open primaries. See Defs.' Ex. T at 25 (Rule No. 34(f)).

The California Democratic Party, the Peace and Freedom Party, and the Libertarian Party of California and certain of their officers brought this action against the Secretary of State of the State of California seeking a declaration that Proposition 198 is unconstitutional and requesting an injunction against its implementation. [FN12] The California Republic Party and certain of its officers intervened as plaintiffs. Californians For An Open Primary intervened as a defendant. [FN13] The court heard testimony over four days and has received numerous exhibits, including the reports of various experts.

FN12. It appears that the political parties did not mount a campaign against Proposition 198 with the voters at the time of the election. See R.T. at 230; Nader v. Schaffer, 417 F.Supp. 837, 850 (D.Conn.1976), aff'd without opinion, 429 U.S. 989, 97 S.Ct. 516, 50 L.Ed.2d 602 (1976) (criticizing plaintiffs for "seeking a change in the law by judicial fiat" rather than by political activity).

FN13. For ease of reference, throughout this opinion the terms "plaintiffs" and "defendants" shall include the intervenors, and when the political "parties" are referred to as taking a position in this action, the term shall include the individual officers who are also plaintiffs.

II.

[1] [1] This case presents two competing views as to the function of the direct primary and, to some extent, as to the function of the political parties. From the parties' perspective, the parties are autonomous organizations and the primary is their opportunity to select their leaders and to define their positions on political questions. From the defendants' perspective, the primaries are the first step by which the electorate as a whole, regardless of party affiliation, chooses its leaders, and the political parties, as they operate to frame the choice of candidates, are a part of a highly regulated governmental activity—the election process. Both positions find support in the Constitution and the relevant case law. The "freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 214, 107 S.Ct. 544, 548, 93 L.Ed.2d 514 (1986). "As a result, political parties' government, structure, and activities enjoy constitutional protection." Timmons v. Twin Cities Area New Party, ___ U.S. ___, ___, 117 S.Ct. 1364, 1369, 137 L.Ed.2d 589 (1997). However, the States also have a strong interest in the conduct of elections. "[T]he Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." Tashjian, 479 U.S. at 217, 107 S.Ct. at 549. It is the clash of these two constitutionally rooted interests that must be resolved in this case.

[2] The Supreme Court has never directly considered the constitutionality of a blanket or open primary. In Democratic Party of United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981), the Court had the opportunity to decide the constitutionality of Wisconsin's open primary but decided the case on a different basis, merely noting that the State Supreme Court had concluded that the "open primary serves [a] compelling state interest"

and that "[u]pon this issue, the Wisconsin Supreme Court may well be correct." Id. at 121, 101 S.Ct. at 1018. [FN14] Perhaps the closest case is Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986), but in Tashjian the Court addressed the reverse of the situation presented here; in Tashjian the state election law provided for a closed primary and the political party desired to open its primary to independent voters. [FN15] Thus, the Court had no occasion to address either the State's interests in an open or blanket primary or the burdens imposed on a political party by such a primary system. Two State Supreme Courts—the Supreme Courts of Alaska and Washington—have examined the constitutionality of the blanket primary and both have concluded that a blanket primary withstands a party's First Amendment challenge. See O'Callaghan v. Alaska, 914 P.2d 1250 (Alaska 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 1690, 137 L.Ed.2d 818 (1997); Heavey v. Chapman, 93 Wash.2d 700, 611 P.2d 1256 (1980); Anderson v. Millikin, 186 Wash. 602, 59 P.2d 295 (1936). As noted above, the Supreme Court of Wisconsin came to the same conclusion concerning the Wisconsin open primary in the face of the Democratic Party's claim that by permitting non-party members to vote in its primary, including Republicans and adherents of other parties, the State's open primary violated the Party's associational rights. See Wisconsin ex rel. La Follette v. Democratic Party, 93 Wis.2d 473, 287 N.W.2d 519 (1980).

FN14. The Court viewed the issue as "whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party." 450 U.S. at 121, 101 S.Ct. at 1018. Justice Powell in dissent would have held that the open primary was supported by compelling interests that outweighed the burden on the National Party. Id. at 126, 101 S.Ct. at 1020. Justice Powell's dissent, like Justice Abrahamson's opinion for the Wisconsin Supreme

Court, discusses many of the issues relevant to this case.

FN15. The Court expressly cautioned that its holding was limited to the particular set of circumstances before it. Id. at 224 n. 13, 107 S.Ct. at 554 n. 13 ("Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership."). Nader v. Schaffer, 417 F.Supp. 837 (D.Conn.), aff'd without opinion, 429 U.S. 989, 97 S.Ct. 516, 50 L.Ed.2d 602 (1976), also addressed the constitutionality of a closed primary. The court held that the State's closed primary was constitutional in the face of a challenge from two voters who wanted to vote in the primary elections without registering with a party. The court concluded that the closed primary was reasonably related to the legitimate goal of protecting the associational rights of party members.

The Supreme Court recently has explained the standard and manner of review that should be applied when a state election law is challenged by a political party on the basis of the First Amendment:

> When deciding whether a state election law violated First and Fourteenth Amendment associational rights, we weigh the 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less-exacting review, and a State's "important regulatory interests" will usually be enough to justify "reasonable nondiscriminatory restrictions." No bright line separates permissible election-related

> regulation from unconstitutional infringements on First Amendment freedoms.

Timmons v. Twin Cities Area New Party, ___ U.S. ___, ___, 117 S.Ct. 1364, 1370, 137 L.Ed.2d 589 (1997) (citations omitted). In describing the "flexible" balancing test now used by the Court, the Ninth Circuit has cautioned that even when "strict scrutiny," the highest standard of review, has been invoked, "its invocation in election law cases has not preordained their outcome." Lightfoot v. Eu, 964 F.2d 865, 869 (9th Cir.1992). Moreover, the Court does not require "elaborate, empirical verification of the weightiness of the State's asserted justifications." Timmons, ___ U.S. at ___, 117 S.Ct. at 1372.

[3] In evaluating the constitutionality of Proposition 198, the court therefore must first determine the character and magnitude of the burdens imposed by the blanket primary on the associational rights of the political parties. The court then must consider the State's interests and weigh the strength of those interests against the particular burdens placed on the parties' associational rights. The greater the intrusion on the parties' associational rights, the greater must be the State's interests and the more narrowly tailored must be the Proposition to advance those interests. [FN16]

> FN16. Defendants stress an argument that must be addressed at the outset. Defendants argue that because a majority of the members of the Democratic and Republican parties, and presumably of the minor parties, voted for Proposition 198, the membership of the parties have consented to Proposition 198 and therefore there is no issue for the court to resolve. There are three problems with this argument. First, even though the polls appear to be accurate, those polls do not report the votes of minor party members. It is only by inference that it can be concluded that minor party members also supported Proposition 198. Moreover,

and second, even if the polls are accurate, this is not the way in which decisions customarily are made in our democracy. In no other context do we accept the results of polling for the act of voting. Finally, the parties have selected certain procedures for the modification of their rules. These procedures require deliberation and decisionmaking by the parties' respective central committees. Other deliberative bodies have similar procedural rules. Such rules may affect the nature of the debate—indeed, may cause there to be debate—and may affect the outcome of the decision. We would not accept a poll of legislators as the equivalent of a legislative vote. For much the same reason, a poll of voters is not the equivalent of a decision by a party according to the procedural rules of the party. The court therefore rejects the argument that the "parties," defined as the electorate, have agreed to Proposition 198 and that this lawsuit is merely an attempt by dissidents to carry on intra-party disputes that they previously lost at the ballot box. For an interesting discussion of "who gets to speak for 'the party'," see Daniel H. Lowenstein, Associational Rights of Major Political Parties: A Skeptical Inquiry 71 Tex. L.Rev. 1741, 1777 (1993).

III.

The parties' main argument is that a blanket primary permits voters who are not members of a particular party—who may indeed be hostile to that party's electoral interests—to vote in that party's primary and thus to participate in the process by which the party defines its positions on a variety of issues and by which it chooses its standard bearers. In Tashjian the Supreme Court recognized the importance of these interests in invalidating a Connecticut statute that forbade the parties from permitting non-members from voting in their primaries:

> [T]he freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.' ... The statute here places limits upon the group of registered voters whom the Party may invite to participate in the basic function' of selecting the Party's candidates. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.

Tashjian, 479 U.S. at 215-16, 107 S.Ct. at 548-49 (citations omitted). Accord Timmons v. Twin Cities Area New Party, ___ U.S. ___, ___, 117 S.Ct. 1364, 1370, 137 L.Ed.2d 589 (1997) ("the New Party, and not someone else, has the right to select the New Party's standard bearer' ").

A.

[4] [2] The parties contend that their interest in limiting candidate selection to their own members is so great that no matter what the State's interest and no matter how Proposition 198 will work in practice, the blanket primary must be unconstitutional on its face. Yet while the interest in determining who will vote in a party's primary is one protected by the First Amendment, and is undoubtedly an important interest, this is not the end of the inquiry. If it were, then open primaries would also be unconstitutional upon any party's objection: an open primary, every bit as much as a blanket primary, permits voters who are not registered in a party to vote in that party's primary. But many of the States have some version of an open primary and to invalidate them all on this theoretical ground would be an extraordinary intrusion into the complex and changing election laws of the States and would remove from the American political system a method for candidate selection that many States consider beneficial and which in

the uncertain future could take on new appeal and importance. [FN17]

> FN17. The expert witnesses in this case differ as to how many of the States have open primaries or some feature of an open primary. Part of this dispute depends on how to classify those States that treat a voter's request for a ballot as tantamount to a declaration of party affiliation. Even if this patent fiction were accepted, close to half of the States permit voters who are not members of a particular party, and who may be independent or, in some States, members of other parties, to vote in that party's primary election. Moreover, as Justice Powell noted, when a voter may register immediately before voting at the primary, "the difference between open and closed primaries loses its practical significance." Democratic Party, 450 U.S. at 132, 101 S.Ct. at 1024 (Powell, J., dissenting).

[5] Similarly, were the parties' power to determine membership and to select their nominees unfettered, then the States would also lack power to prescribe candidate selection through a primary election or to require that all voters who have met a State's registration requirements be permitted to vote in the parties' primaries notwithstanding any other membership requirement that a party might impose. [FN18] However, the States have considerable regulatory authority over the process of candidate selection and may require that the parties select their candidates by a primary election open to registered voters. See Lightfoot v. Eu, 964 F.2d 865, 871 (9th Cir.1992) ("political parties' rights to nominate whomever they want, however they want, is not sacred"); Timmons v. Twin Cities Area New Party, ___ U.S. ___, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (State can prohibit fusion candidacies). The States' authority over the political parties stems in part from the Constitution, Art. I, 4, cl. 1, and in part from the public function that the political parties perform in the candidate nominating and political processes.

> FN18. The most dramatic example of government control of a political party's membership requirements are the White Primary Cases in which the Supreme Court held that the Democratic Party of Texas could not exclude black voters from its primary. See Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944). An interesting example of how a party's desire to limit its membership could conflict with state law is suggested by the testimony of plaintiff Gail Lightfoot, a member of the State Executive Committee of the Libertarian Party: "You become a member of the Libertarian Party by joining, by asking. It's a request to become a member. And you pay dues and sign a pledge [of nonviolence]. In California, because of state law, state law says that all registered voters that take the name Libertarian are members of the party. But we consider pledge-signing individuals who have paid their dues and signed the pledge to be the true members of our party." R.T. at 153-54; see also R.T. at 179 (Peace and Freedom Party confers party membership on persons who are "deprived of the right vote by the State of California because of age, citizenship, or prior social behavior").

Moreover, the analogy on which the parties rely so heavily, the analogy between the political parties and the myriad of private political, charitable, recreational, educational or religious associations at the center of American life, is imperfect at best. The political scientists who testified in this case agree that a political party cannot be described simply as a private club or association; instead, a political party has three distinct aspects—the party in the electorate, the party organization, and the party in government. [FN19] Unlike other private associations, at least in one of their avatars— the party in government—the political parties are very like the government itself. See Lowenstein, supra, at 1757 ("unlike any other private groups, political parties routinely, pervasively, and legitimately exercise their influence from within the

government"). And the parties perform functions that are fairly characterized as governmental in nature, such as the nomination of candidates.

> FN19. See Pls.' Ex. 6, Cain Report, at 15 ("Since the seminal work of the scholar V.O. Key, parties are thought to consist of three components: the party in government, the party in the constituency and the party as organization."); Lowenstein, supra, 71 Tex. L.Rev. at 1760 (1993) ("Although there have been a great many typologies of the varying 'locations' and functions of parties, probably the most common identifies three: the party in the electorate, the party organization, and the party in or running for public office ... The very fact that references to 'the Democrats' and 'the Republicans' are more common in ordinary conversation than references to the Democratic party' and 'the Republican party' testifies to the loose and manifold nature of our concept of 'party.' ").

Furthermore, at least the major political parties lack the unity of purpose and cohesive membership characteristic of most private organizations. The major political parties in this country " 'have been characterized by a fluidity and overlap of philosophy and membership.' It can hardly be denied that [the parties] generally [have] been composed of various elements reflecting most of the American political spectrum." Democratic Party, 450 U.S. at 133, 101 S.Ct. at 1024 (Powell, J., dissenting) (citations omitted). And, as discussed above, the term "party member" as applied to registered voters is something of a misnomer. The States determine who will vote at primary elections—registered voters. See Cal. Elections Code §§ 2151, 7164, 7362, 7804, 8001. These voters have not allied themselves to a political party in the customary way that one normally becomes a member of a private association; they have not paid dues, taken an oath, expressed agreement with certain ideals or goals, attended meetings, accepted any obligations, or attended upon any other rite of initiation. The

parties do not and could not insist upon more than mere registration as the price of voting in the primary elections. [FN20] Thus, to contend that Proposition 198 permits non-party members to vote in a party's primary, while accurate, covers over much of the imprecision in the political reality.

> FN20. "[T]he essence of the legal definitions of party membership in the United States will surely continue to be self-designation. The fact remains that today even in Illinois, New York, or any other closed-primary state you are a Democrat if you say you are; no one can effectively say you are not; and you can become a Republican any time the spirit moves you simply by saying that you have become one. You accept no obligations by such a declaration; you receive only a privilege, the privilege of taking an equal part in the making of the party's most important decision, the nomination of its candidates for public office. The only remaining restriction is that in some states, such as California, you may have to let the registrar of voters know that you have changed parties, and you may have to do so several weeks or even months before your new party's next primary. But in many closed-primary states you do not even have to do that, and in Wisconsin and the other open-primary states you are not allowed to make an official declaration of your party membership. One can only conclude that the so-called 'closed' primaries are just a hair more closed than the so-called 'open' primaries." A. Ranney, Curing the Mischiefs of Faction 166-67 (1975), quoted in Wisconsin ex rel. LaFollette v. Democratic Party, 287 N.W.2d at 510.

In short, it is necessary to look beyond the parties' claim that their constitutional interest in limiting candidate selection to their respective members necessarily prevails over any State interest and without regard to how the voters may behave under a blanket primary.

B.

[6] Turning to the more practical implications of a blanket primary, the parties contend that a blanket primary process in California will have a destructive effect on all political parties both major and minor. The parties predict that there will be widespread cross-over voting, whether benevolent or malicious, and that the consequences of this large cross-over vote will be many and adverse to the parties. The parties contend that the cross-over vote, and the prospect of a large cross-over vote, will affect the selection and behavior of party nominees and elected officials; weaken party discipline; increase the costs of primary elections by causing candidates to compete as if it were a general election; dampen the morale of party activists; and disrupt internal party structure and governance.

[7] Much of the testimony at trial was directed to the question of whether voters in blanket primary states tend to cross over in sufficient numbers to influence the outcome of elections and whether they cross over for benevolent or malevolent reasons. A cross-over voter is one who votes for a candidate of a party in which the voter is not registered. Thus, the cross-over voter could be an independent voter or one who is registered to a competing political party. [FN21] A cross-over voter may be actuated by three different purposes. First, the voter's purpose may be to vote for the voter's most preferred choice to win in the general election; this kind of cross-over voter is sometimes referred to as engaging in "sincere" voting. Second, the voter may be engaged in "strategic" voting, designed to obtain the best possible outcome, by voting for the voter's second choice in a setting where the voter's first choice, within the voter's own party, either has no apparent chance of victory at the general election or is so certain to win the party's nomination that the voter perceives that his or her vote is best spent influencing another party's primary and thus the choice at the general election. Finally, the voter may be a raider, crossing over to vote for a candidate who is perceived as the "weakest" of an opposing party's candidates

in the hopes that this candidate will win the primary only to be trounced at the general election. [FN22]

FN21. Some of the experts exclude independents from their definition of cross-over voters.

FN22. A sophisticated raider will vote for the weakest among those candidates who have a realistic chance of prevailing at the primary.

[8] The parties contend that a blanket primary will unleash a torrent of cross-over voting even by comparison to open primaries. The parties reason that unlike an open primary, a blanket primary permits a voter to cross over as to particular contested elections without losing the ability to vote in the remainder of the contests in the voter's own party. The evidence at trial suggests that the parties are correct that cross-over voting will be more prevalent after Proposition 198. Indeed, defendants can hardly dispute this point while maintaining that the State's interests are furthered by a blanket primary precisely because it facilitates cross-over voting. Nonetheless, the parties' characterization of the likely amount or effects of cross-over voting due to a blanket primary is overdrawn.

To begin with, there is little evidence that raiding will be a factor under the blanket primary. On this point there is almost unanimity among the political scientists who were called as experts by the plaintiffs and defendants. Professor Costantini, for plaintiffs, gave his opinion that

> [s]urvey evidence tends not to support any fear that raiding (sometimes characterized as "mischievous voting") will be a common phenomenon under Proposition 198. At least in open presidential primaries (the focus of almost all the relevant studies), it appears that the great majority of crossover voters—from 90% to 95% or more—invade a party's primary to vote for a

> preferred candidate and not to vote for a candidate who they will oppose in the general election and who they believe will be easier to defeat in that election.

Pls.' Ex. 7, Costantini Report, at 7; R.T. at 485-86. Professor Donald Olson of the University of Washington-Seattle, reflecting on the over half century of experience with a blanket primary in Washington, explained that the conditions for successful raiding rarely exist:

> The potential for raiding under the blanket primary generates wide media attention and spawns electioneering lore that is simply unwarranted by actual experience. Technically defined, raiding would occur where partisan voters of party X cross-over in sufficient numbers to help select the weakest or most vulnerable candidate in party Y. The requirements for this form of electoral subterfuge are: 1) the absence of a meaningful primary contest in party X; 2) provision of sufficient information to identify the weaker and most vulnerable potential opponent in party Y; 3) concerted action by a large enough bloc of voters in party X to influence the outcome in the primary of party Y; and 4) the abandonment of traditional party loyalties by partisan voters to enter the opponent's primary.
>
> In the experience of Washington state, these requirements are simply too demanding and have not been fulfilled in actual practice.

Defs.' Ex. G, Olson Report, at 6. See Pls.' Ex. 6, Cain Report, at 6-7; R.T. at 355. Given that the purpose of raiding is to weaken a competitive party's advantage at the general election, raiding is not a concern for minor parties because their candidates rarely have a chance of prevailing at the general election. Indeed, no conclusive instance of raiding in such numbers as to affect the outcome of any primary was offered by plaintiffs. [FN23]

> FN23. Professor Cain suggests that the 1974 Alaska Gubernatorial Republican primary may be an example of raiding in which Democrats and Independents "raided" to support liberal Republican Jay Hammond over former Governor Walter Hickel. However, as Professor Cain notes, the cross-over voters may have been "liberal shoppers" as opposed to saboteurs. See Pls.' Ex. 6, Cain Report, at 7.

As to benevolent cross-over voting, the evidence suggests that there will be particular elections in which there will be a substantial amount of cross-over voting—perhaps as high as 25% of the vote for that office—although the cross-over vote will rarely change the outcome of any election and in the typical contest will not be at significantly higher levels than in open primary states. There will be a small number of elections in which the cross-over vote proves decisive, and there will be other elections in which the possible importance of the cross-over vote will be an influence on the conduct of the primary campaign and the conduct of elected officials.

The experience in Washington suggests that as to the election for any particular office, approximately 10% of the voters are cross-over voters, excluding independents, while in some exceptional cases this figure may rise as high as 20-25%. R.T. at 511. [FN24] Typically the cross-over vote in Washington does not change the result of an election but only the margin of victory. R.T. at 513. Moreover, the amount of cross-over voting is greater in a blanket primary than an open primary but not dramatically so. According to Professor Nagler, who co-authored the most comprehensive study of patterns of cross-over voting presented at the trial, the average cross-over rate, excluding independents, is something on the order of 5% of voters in closed primary states, [FN25] 10% of voters in open primary states, and 11-15% in blanket primary states. R.T. at 780, 788; Defs.' Ex. H, Alvarez and Nagler Report, at 11-12. The study concludes that "crossover voting in blanket primaries is not dramatically higher than in other types of

open primary systems" and that "there is very little crossover voting in general in primary elections in the United States." Id. at 35-36. [FN26]

FN24. According to Professor Olson, approximately 25-33% of voters vote for candidates of only one party throughout the ballot, voting a straight ticket. The remainder of the voters cross over at least once.

FN25. In a closed primary state, a cross-over voter is one who identifies with one party but decides to register in another party for the purpose of voting in the primary of that other party.

FN26. Plaintiffs fail to present substantial or convincing evidence that the minor political parties will be affected by cross-over voting to any significant degree. A strategic voter would not cross-over to vote in a minor party's primary because the victor of the minor party primary will not likely be the winner in the general election. Moreover, the minor parties rarely have contested primaries. R.T. at 167, 618, 630-31. Finally, the minor parties make much of their small turn-out at the primary election compared to the much larger numbers of voters who select their candidates at the general election. From this disparity, the minor parties argue that they will be swamped at the primary election by the same non- party members who vote for their candidates at the general election. This conclusion does not follow. Those non-party members who vote for minor party candidates at the general election are most likely voters whose preferred candidates were not selected in the primary of a major party. R.T. at 193.

[9] Although cross-over voting typically does not change the outcome of a primary and may not be much greater in a blanket than in an open primary, it is probable over time that

there will be some elections under Proposition 198 that will be decided by the cross-over vote. Cross-over voting is most likely to occur when one party's primary is competitive while the other party's primary is not. When this condition of "asymmetric competition" occurs, voters of the party with the noncompetitive primary may cross over to the other primary to influence the choice. The incentive to cross over will be particularly high if the winner of the other party's primary is almost certain to win at the general election. See Pls.' Ex. 6, Cain Report, at 8. Every two years in California there are 80 Assembly races, 20 State Senate races, and 52 Congressional races. Examining the 1996 Assembly primaries, Professor Cain identified ten races in which there were asymmetric competitive conditions. In some of these races, a cross-over rate of 5% could have changed the outcome of the election had all of the cross-over voters voted for the same candidate. Given that in Washington, cross-over rates occasionally reach levels as high as 20-25%, and that the cross-over rate in California could be higher than Washington, [FN27] it is likely that in the fullness of time some California primary races will be decided by cross-over voters, even if the number of such occasions is not large. Depending on the circumstances, the swing of even one seat could give a legislative majority to one party.

FN27. See R.T. at 574. Whether cross-over rates in California will be similar to those in the other blanket primary states is necessarily a matter of conjecture.

[10] Furthermore, the possibility of a decisive cross-over vote-whether or not that vote materializes—could well affect the conduct of elections and elected officials. Under a blanket or open primary, the primary election becomes similar to the general election. Candidates will perceive a need or opportunity to attract support from the entire electorate, not simply from members of their respective parties. This will affect not only the cost of the primary—which is likely to increase, see R.T. at 270—but may affect the positions that candidates take

on political issues as they seek to attract cross-over voters. Moreover, once elected, candidates may perceive that the cross-over vote makes them less vulnerable at the primary to the wrath of the party organization or party regulars for acts of apostasy. A blanket or open primary weakens the "disciplining effect" of the primary challenge in requiring "the officeholder [to] carry out the party philosophy and support the majority position of the party caucus." R.T. at 214. The corollary to this loss of discipline is a loss of power to party activists such that the ardor of party volunteers and activists may be dampened in a system that permits non- party members to exert influence over the party's selection of a candidate. This has been the experience in Washington and is likely to occur in California. See R.T. at 558; R.T. at 18; R.T. at 989-990.

[11] Finally, the parties argue that their internal governance will be disrupted by the blanket primary and the cross-over vote. Although Proposition 198 specifically exempts party committee positions from the blanket primary, both the Republican and Democratic Parties permit officeholders and nominees to appoint members of their governing bodies, the Democratic State Central Committee and the Republican State Central Committee. Because nominees may have been selected by non-party members, and because the nominees in turn choose members of the Central Committees, the parties contend that their governing body may be adulterated. Further, the parties warn that their respective national organizations may not accept the results of the California presidential primary, if that primary is a blanket primary, with the result that the parties may be forced to hold a nominating convention or caucus. Neither of these contentions is particularly forceful, however. As to membership on the Central Committee, the parties are free to change their selection process if they wish. Moreover, both parties already give more positions on the Central Committee to successful candidates; yet these successful candidates are precisely those who have appealed more broadly across party lines. R.T. at 9, 224. As to the

national nominating conventions, the California parties may be forced to adopt a different procedure for delegate selection other than the presidential primary or they may receive a waiver from their national organizations such as Wisconsin eventually received from the Democratic Party. R.T. at 123, 145. This is a choice for the parties to make, and they can do so as they please without interference from the State.

C.

[12] The magnitude of the burdens imposed on the parties by Proposition 198 are not fairly characterized either as "severe" or as "negligible," the two labels most often applied in the caselaw at this juncture of the analysis. The burdens are not negligible. State law requires each party to select its candidate through a primary, and the winner of the primary will be the party's nominee. The blanket primary wrests a measure of control of the primary process from the party and its members. This is its purpose. The party may still endorse a candidate and may throw financial support to a particular candidate. And, in the typical election, the cross-over vote will not be decisive. Yet by permitting non-party members to vote in a party's primary— even granting the uncertainty of the label "party member"—Proposition 198 is an intrusion on a party's traditional right to select its own candidate. In this respect, the blanket primary is no different from an open primary although the practical effect of a blanket primary on the selection process may be somewhat greater than an open primary. In addition, a blanket primary, like an open primary, may depress the vigor and morale of party activists and may affect the ability of the party to discipline errant legislators.

[13] On the other hand, the burdens on the parties due to Proposition 198 are not likely to prove severe or debilitating. The Washington experience, as well as that of the many open primary states, suggests that Proposition 198 will not diminish the efficacy or strength of the political parties in California by any substantial degree. [FN28] Indeed, a study of the political

parties in the 1970's and 1980's in 13 western states, including Washington and California, concluded that the political parties in Washington were the most competitive with one another of all 13 states. R.T. at 524; see Tashjian, 479 U.S. at 223 n. 12, 107 S.Ct. at 553 n. 12 ("dire" predictions as to decay of parties not borne out by the 29 States that have open primary features). Both the Democratic and Republican Parties continue to be strong political parties in Washington, and can be expected to operate with little diminution in their effectiveness in California. [FN29] The parties do not show that the blanket primary is significantly different theoretically or practically from the open primary. Nor do they show or even contend that Proposition 198 has any discriminatory purpose or effect. Thus, the burden imposed by a blanket primary falls evenly on all of the parties whatever their size or ideology. Finally, Proposition 198 leaves untouched the wide field of party endeavor that is not directed specifically to the primary, activities such as developing the party platform, registering new voters, and getting out the vote on election day. Defs.' Ex. I, Quinn Report at 18.

FN28. Professor Cain would not expect a blanket primary to be so debilitating to the parties that it should be removed as an option altogether even if the parties were in favor of it. R.T. at 457. Professor Cain's greatest concern is to protect party autonomy.

FN29. According to Professor Olson the Washington Republican Party has been ranked as among the strongest Republican parties in the nation. Professor Olson states that the Washington Republican Party "is alive, it is healthy, it is well, it is vigorous. It is the single most important institution for recruiting candidates to run for office. It's the single most important institution for endorsing candidates. It is the most important fundraising institution in the conduct of elections." R.T. at 527. According to Professor Olson although the Washington Democratic Party is not so

dynamic as its competitor, it is still of above average organizational strength as compared to the Democratic parties of the 50 states. R.T. at 528.

[14] In light of all of these considerations, the court finds that the parties have succeeded in showing that the blanket primary imposes a significant but not severe burden on their associational rights. To survive the challenge mounted by plaintiffs, Proposition 198 must be supported by interests that are sufficient to outweigh the burdens identified above. Those interests need not be compelling, given that the burdens are not crushing, but they must be important.

IV.

[15] The States have broad regulatory authority over the conduct of elections including primaries. [FN30] The primary election is the critical first stage in the electoral process: "The direct primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers." Storer v. Brown, 415 U.S. 724, 735, 94 S.Ct. 1274, 1281, 39 L.Ed.2d 714 (1974). "As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations [by the political parties] have been made." Morse v. Republican Party, 517 U.S. 751, ___, 116 S.Ct. 1186, 1199, 134 L.Ed.2d 347 (1996) (citation omitted).

FN30. "[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of

> voters, and the selection and qualification of candidates." Storer v. Brown, 415 U.S. 724, 729-30, 94 S.Ct. 1274, 1278-79, 39 L.Ed.2d 714 (1974).

Proposition 198 is the latest development in a history of political reform measures that began in the Progressive Era. "The Progressives believed democracy should be something greater than competition between political parties." Lightfoot v. Eu, 964 F.2d at 872. The Progressives sought to diminish the importance of the parties and "party bosses" by establishing nonpartisan local elections, a comprehensive civil service system, direct legislation through the initiative and referendum, and the cross-filing system by which members of one party could run in the primary of the other party. See Defs.' Ex. I, Quinn Report, at 7 (quoting J. Owens and E. Costantini, California Politics and Parties (1970)). [FN31] The cross-filing system is of particular note because in practice it bore some resemblance to a blanket or nonpartisan primary system. [FN32]

> FN31. Lowenstein contrasts the Progressives' "vision of a democracy purged of corruption by placing widely dispersed power in the hands of common men and women" with the views of "party renewal advocates" who believe in autonomous, strong, cohesive political parties who engage in "responsible party government" much on the European parliamentary model. See Lowenstein, supra, 71 Tex. L.Rev. at 1761-71, 1791. The debate in this case has been framed by the experts in similar terms.

> FN32. Under the cross-filing system, "[a] candidate registered in one party may seek the nomination of all parties at the primary. If he fails to secure the nomination of his own party, he cannot be the candidate of any party at the general election." Jones v. McCollister, 159 Cal.App.2d 708, 324 P.2d 639 (1958). Under the cross-filing system voters registered to different parties had the opportunity to vote for the same candidates. According to Dr. Quinn, as the system worked in California, the winner of one party's primary tended to be the winner of the other party's primary as well:

> The cross filing system existed in California from 1911 to 1959. Under this system, a legislator or member of congress could file to run in both the Democratic and Republican primaries, and so long as he or she won their own party nomination, they would win the nomination of the other party as well.... On the general election ballot, the winners, usually incumbents, are shown as the nominees of both parties.
>
> Defs.' Ex. I, Quinn Report, at 7.

[16] Defendants advance a number of State interests furthered by Proposition 198. All of the various interests, however, reduce to one fundamental contention: according to defendants, Proposition 198, like other Progressive Era reforms, enhances the democratic nature of the election process and the representativeness of elected officials.

[17] Defendants stress that a blanket primary opens up the candidate selection process to two types of arguably "disenfranchised" voters—independents and minority party voters in safe districts. In a blanket primary, independent voters will be able to participate in framing the choice that they will ultimately have to make in the general election. Approximately 11% of the electorate in California are registered as independents, and the proportion of independent voters is growing rapidly. R.T. at 940. Moreover, many California voters reside in "safe districts," districts in which one party is dominant. [FN33] Voters in these districts who belong to the minority party have no influence or voice because the general election is decided as a practical matter in the primary of the dominant party. Of 15.6 million registered voters in Califor-

nia, approximately one quarter are "disenfranchised" in this way. R.T. at 854. Defendants suggest that the inability of these voters to influence the outcome of the election in their districts leads to the election of representatives who see no need to represent these voters or to pay heed to their interests. Of course, such voters could register in the majority party, but this would require them to give up their current party or independent registration.

> FN33. According to Dr. Quinn, "A district could be considered safe if it had not been contested between the parties since it was created in the 1991 reapportionment; the area covered had been historically one party in its voting ...; there was no significant money spent in the election between the two parties in '94 and '96 ...; and if the incumbent received more than 55 percent of all of the votes cast in the election." R.T. at 847- 48.

Apart from the exclusion of independents and minority voters in safe districts, defendants contend that the closed primary gives undue power to party members and loyalists, including incumbent elected officials, such that the voters in the general election are presented with candidates who are more partisan and who take positions on the policy issues of the day that are not representative of the majority of the electorate. See R.T. at 243, 269, 299, 857. Defendants note that turnout is low at primary elections, and thus that a minority of more partisan party members, influenced by the endorsements of party leaders, determine the choice for the much larger group of all voters at the coming general election. Defendants suggest that this skewing of the process toward partisan candidates leads to legislative impasse and thus alienation of the electorate from the political system. Defendants contend that candidates who would command majorities at the general election are unable to prevail at the primary such that the voters at the general election are forced to pick among candidates none of whom is the first choice of the majority of

voters. R.T. at 255-256. Although these assertions are not readily susceptible of proof, many are not contested, [FN34] or are supported by persuasive opinion evidence from defendants' experts. See, e.g., R.T. at 954-963, 974-975. Furthermore, these contentions are clearly stated in the ballot pamphlet, and it is a fair inference from the margin of support that the people of California agree that a blanket primary system will lead to the election of more representative "problem-solvers" who are less beholden to party officials and "special interest groups." While political scientists may disagree on the question of whether the political system is benefitted when parties are more or less distinct or polarized, it is apparent that the voters have sided with less partisanship in adopting Proposition 198. [FN35]

> FN34. There is some evidence that elected officials from blanket primary states are closer to the views of the electorate as a whole than officials from closed primary states. See Defs.' Ex. E, Gerber Report, at 11. Some of plaintiffs' experts apparently would agree that candidates selected in a blanket primary are likely to take less partisan or extreme positions than those selected in a closed primary. They do not concede that this is healthy, however, because they believe that the system is benefitted by greater partisanship and greater distance between the parties.

> FN35. There is some suggestion in defendants' brief that the blanket primary will also make the parties more representative and therefore will benefit and strengthen the political parties. Defs.' Post-Trial Brief at 45. The Supreme Court has given little weight, however, to State interests couched in terms of what is good for the parties. The Court has found that it is for the parties to decide what is in their interest. See Tashjian, 479 U.S. at 222-24, 107 S.Ct. at 552-53; Eu v. San Francisco County Democratic Cent. Comm.,

489 U.S. 214, 227-28, 109 S.Ct. 1013, 1022-23, 103 L.Ed.2d 271 (1989).

Defendants also argue that representativeness and democratic participation are benefitted by the higher voter participation expected in a blanket primary election. Voter participation in primary and general elections in California has declined markedly over the past two decades. R.T. at 658. Turnout rates in blanket primary states have been higher than in California, and there is reason to expect that by providing more choice, the blanket primary may encourage more voters to participate at the primary election. Similarly, defendants contend that elections will be more competitive under the blanket primary, again leading to an increase in voter interest and participation. Although the empirical case for the assertion that blanket primaries are more competitive than other primaries is not conclusive, there is reason to expect some increase in the number of candidates, the closeness of elections, and, therefore, voter turnout.

Finally, defendants point to one interest—voter privacy—that does not fit neatly under the representativeness or participation headings, although it is possible that greater privacy could lead to greater participation. Defendants note that a blanket primary protects voter privacy by permitting voters to participate in the primary election without publicly declaring a party affiliation as is the case in closed primary states and in some open primary states.

V.

[18] [3] Taken as a whole the State's interests that support the blanket primary are substantial, indeed compelling. There is a "substantial state interest in encouraging compromise and political stability, in attempting to ensure that the election winner will represent a majority of the community." Storer v. Brown, 415 U.S. 724, 729, 94 S.Ct. 1274, 1278, 39 L.Ed.2d 714 (1974). In attempting to reduce partisan strife, Proposition 198 is similar to other measures adopted by the States to deal with the problem of factionalism, a problem that deeply troubled the framers of the Constitution. See The Federalist No. 10 (Madison). A State's interest in ameliorating "unrestrained factionalism" is a compelling one. Increasing the representativeness of elected officials, giving voters greater choice, and increasing voter turnout and participation in the primary process are all interests of the first order. See Lightfoot v. Eu, 964 F.2d 865, 872 (9th Cir.1992) (State's interest in a direct primary is compelling). The voters' belief in the fairness of the electoral process is also a substantial state interest; it is apparent that the voters of California believe that the system is fairer when all voters, including independents and regardless of party affiliation, may participate in framing the choice of candidates at the general election. And while the parties argue that there are other ways to increase voter turnout, the fundamental goal of enhancing representativeness by providing all voters with a choice that is not predetermined by party members alone can only be advanced by the blanket primary. Unlike Tashjian in which the Democratic Party controlled the legislature and attempted to tell the Republican party who could vote in its primary, and where the State's purported interest in a closed primary was to protect the parties from disruption from without, Proposition 198 is a non-discriminatory measure that was adopted by a clear majority of voters, with a convincing margin from both major parties, and which advances interests that are uniquely those of the State and its electorate as opposed to the parties. These interests outweigh the also substantial interest that the political parties have in controlling who votes in the primary.

In reaching this conclusion, the court does not decide whether a blanket primary is a good idea; it may prove to be a bad idea, in which case the people of the State presumably will act to reform the system in the future as they have in the past. Nor does the court decide whether the voters were correct in concluding that a more representative and participatory

system is desirable at this time in the State's history or whether it is wise to weaken the parties by some degree to further the goals of representativeness and participation. These important questions are for the people of the State to decide.

Each of the States has its own experiment in democratic government. The history of election law is one of change and adaptation as the States have responded to the play of different political forces and circumstances. There is little reason to expect that the future will be any different. The court concludes that a blanket primary serves sufficiently weighty interests that the State of California should not be precluded from ever trying such a procedure.

Judgment is awarded to defendants.

IT IS SO ORDERED.

APPENDIX B — ORDER AND AMENDED MEMORANDUM OF OPINION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED AND FILED NOVEMBER 24, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV S-96-2038 DFL

CALIFORNIA DEMOCRATIC PARTY, ART TORRES, KATHY BOWLER, PAUL JORJORIAN, PEACE AND FREEDOM PARTY, C.T. WEBER, LIBERTARIAN PARTY OF CALIFORNIA and GAIL LIGHTFOOT,

Plaintiffs,

v.

BILL JONES, Secretary of State
of the State of California,

Defendant.

CALIFORNIA REPUBLICAN PARTY, MICHAEL SCHROEDER, SHAWN STEEL, and DONNA SHALANSKY,

Intervenors/Plaintiffs,

CALIFORNIANS FOR AN OPEN PRIMARY,

Intervenor/Defendant.

Appendix B

ORDER

The Memorandum of Opinion filed November 17, 1997 is ordered amended as follows:

1. Page 9, note 10, line 21½: omit "(Gerber *Report*)";

2. Page 13, line 1: replace "state's" with "State's";

3. Page 17, note 17, line 18: insert a comma after "Justice Powell noted";

4. Page 26, line 14: omit "or uncontested";

5. Page 36, note 34, second sentence, at line 24½: replace "blanket" with "closed." The sentence shall read: "some of plaintiffs' experts apparently would agree that candidates selected in a blanket primary are likely to take less partisan or extreme positions than those selected in a closed primary";

6. At page 40, lines 13-15: replace lines 13-15 with "Judgment is awarded to defendants."

IT IS SO ORDERED.

Dated: 24 November 1997.

s/ David F. Levi
DAVID F. LEVI
United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV. S-96-2038 DFL

CALIFORNIA DEMOCRATIC PARTY, ART TORRES, KATHY BOWLER, PAUL JORJORIAN, PEACE AND FREEDOM PARTY, C.T. WEBER, LIBERTARIAN PARTY OF CALIFORNIA and GAIL LIGHTFOOT,

Plaintiffs,

v.

BILL JONES, Secretary of State
of the State of California,

Defendant.

CALIFORNIA REPUBLICAN PARTY, MICHAEL SCHROEDER, SHAWN STEEL and DONNA SHALANSKY,

Intervenors/Plaintiffs,

CALIFORNIANS FOR AN OPEN PRIMARY,

Intervenor/Defendant.

AMENDED MEMORANDUM OF OPINION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appendix B

In March of 1996, the people of the State of California, by a wide margin, adopted Proposition 198, an initiative statute known as the Open Primary Act. Proposition 198 converts the State's primary election from a closed to an open or blanket primary in which voters may vote for any candidate regardless of the candidate's or the voter's party affiliation. In a blanket primary under Proposition 198, one ballot will be prepared at the primary election for all voters just as in the general election. Because a blanket primary permits voters to vote in the primary election of a party without being registered in that party, the political parties and party officials who bring this action contend that Proposition 198 violates their right of association guaranteed by the First Amendment of the Constitution.

The court concludes that Proposition 198 withstands this constitutional challenge.

I.

Under Proposition 198 "All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote . . . at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation."[1] By this language and the conforming amendments to the State Election Code, Proposition 198 changed the California primary from a closed

1. Proposition 198 added to the Election Code the language quoted in text as a new § 2001. The Proposition also made conforming amendments to §§ 2151, 13102, 13203, 13206, 13230, 13300, 13301, and 13302. *See* Defs.' Ex. A.

Appendix B

to an open or blanket system.[2] As the Legislative Analyst explained in the ballot pamphlet distributed to voters before the election, under the closed system "[i]n order to vote in primary elections for partisan offices, a voter must have identified a political party affiliation when registering to vote and can vote only for candidates of that party." Defs.' Ex. A at 5. Thus, for example, in the closed primary a registered Democratic Party voter receives a ballot that includes only candidates competing for the Democratic Party nomination. Only registered Democrats could vote for these candidates, and the winner of the primary would be the Democratic Party's candidate at the general election.[3] By contrast, the Legislative Analyst explained, in the blanket primary instituted by Proposition 198:

> [A]ll persons who are entitled to vote in primary elections, including those not affiliated with a political party [are allowed to] vote for any candidate regardless of the candidate's political

2. California has had a closed primary since 1909 when the State substituted direct nomination of candidates by primary elections in place of nominating conventions held by the political parties. In 1900 California briefly experimented with a blanket primary, but the California Supreme Court held it unconstitutional under the State Constitution. *See Britton v. Board of Election Comm'rs*, 129 Cal. 337, 346-47 (1900). No claim is made under the State Constitution in the present case.

3. Cal. Elec. Code § 15451 provides: "The person who receives the highest number of votes at a primary election as the candidate of a political party for nomination to an office is the nominee of that party at the ensuing general election."

> party affiliation. Thus, voters in primary elections would be allowed to vote for candidates across political party lines. Furthermore, the initiative provides that county elections officials prepare only one ballot for all voters. The candidates for an office would be listed randomly on the ballot and not grouped by political party affiliation. The candidate of each political party who receives the most votes for a state elective office becomes the nominee of that party at the next general election.

Defs.' Ex. A at 5. Therefore, in the blanket primary after Proposition 198, a registered Democratic Party voter, for example, could vote for a Republican Party candidate for Governor and a Democratic Party candidate for Assembly, and so on down the ballot. An independent voter could do the same.[4] Through such cross-over voting, it is possible under the blanket primary for independent voters and voters registered in one party to participate in the primary election of another party.

In the statement of support included in the ballot pamphlet, proponents of Proposition 198 argued that the closed primary "favors the election of party hard-liners, contributes to legislative gridlock, and stacks the deck against more moderate problem-solvers." The open primary would permit voters to vote "for the best candidate for each office, regardless of party affiliation" thereby giving voters greater choice. In addition, according to proponents, the blanket

4. The election of political party committee members is not affected by Proposition 198. As to these party offices, voters may only vote for candidates of their own party registration.

primary would increase voter participation in the primary election, restore healthy competition particularly in "safe" legislative districts in which one party clearly dominates, make elected officials more responsive to voters as opposed to party officials, reduce the power of special interest groups, and strengthen the political parties by assuring the nomination of candidates with broader bases of support. Opponents of Proposition 198 contended that it would work an unconstitutional interference with the right of the parties to choose their nominees: "Allowing members of one party a large voice in choosing another party's nominee — which Proposition 198 would do — is like letting UCLA's football team choose USC's head coach!"[5] According to the opponents, the existing closed primary provided a "real choice" among candidates of different parties while a blanket primary would be "an invitation to political mischief" by special interests and political consultants. Defs.' Ex. A at 6-7.[6]

At the election, Proposition 198 was adopted by a convincing margin of those voting — 59.51 percent

5. "Should Democrats be allowed to nominate Republican candidates for office? No! Should Republicans be allowed to nominate Democratic candidates for office? No!" Defs.' Ex. A at 7.

6. In light of the arguments for and against presented in the ballot pamphlet, it cannot fairly be argued that the voters were misled or inadequately advised as to the effects and purposes of Proposition 198. *Compare Jones v. Bates*, No. 97-15914, 1997 WL 629803 (9th Cir. Oct. 7, 1997), *reh'g granted*, 1997 WL 701200 (Nov. 4, 1997) (majority of panel concludes that voters were not adequately advised as to effect of Proposition 140, the term limit initiative).

(3,340,642 votes) to 40.49 percent (2,273,064 votes). According to reliable exit polls, Proposition 198 was supported by 61 percent of Democrats, 57 percent of Republicans, and 69 percent of Independents. The measure was supported by a majority of every demographic subgroup, including groupings by sex, age, race, education, political ideology, income, religion and party identification. Defs.' Exs. B & D. Proposition 198 commanded majorities in every county in California and in 75 of the 80 Assembly districts. Defs.' Ex. I. Although the turnout by California's six minor parties was too small to sample, given the broad public support for Proposition 198 among all groups of every sort, it is likely that a majority of the members of these parties also favored the initiative. R.T. at 847 (Testimony of Thomas Quinn). Moreover, the vote on Proposition 198 reflects the long-standing support for an open primary among California voters. According to Mervin Field, an eminent California political polling expert, Californians have favored an open primary by wide margins since at least 1983. *See* Defs.' Exs. L-2 & L-5.[7]

By passing Proposition 198, California joined a small group of states, consisting of Alaska, Louisiana, and Washington, who also have blanket or nonpartisan primary elections. The other states have either a closed or an open

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7. Mervin Field testified at the trial to his conclusion that as to Proposition 198 "there was remarkable consistency over a 13-year period, and that when the vote on Prop 198 was in, comparing that with the study that we did then 13 years prior, it showed that this concept, as it's posed here, and as it was posed in 198, struck a deep-seated chord with the voting public." R.T. at 645.

primary, or some variant of the closed or open primary.[8] In the classic closed primary, such as California had prior to Proposition 198, participation in a party's primary election is limited to voters who have registered as members of that party a specified period of time prior to the primary election. Fifteen states have closed primaries of this kind. *See* Defs.' Ex. E, *Gerber Report*, at 2-4. Eight additional states have a "semi-closed" primary: participation in a party's primary is limited to those who have registered as party members *and* independents. *Id.* Participation of registered members of other parties is not permitted.

In an open primary, a registered voter may request, on election day, the ballot for any party's primary in which the voter intends to vote, whether or not the voter previously has registered as a member of that party; however, the voter may only vote in one party's primary election. Twenty-one states have an open primary in this sense of the term. *Id.*[9]

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8. "The distinctions between open and closed primaries are easy to exaggerate. Too simple a distinction ignores the range of nuances and varieties within the closed primary states." F. Sorauf, *Party Politics in America* 206 (4th ed. 1980), *quoted in Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 133 n.8 (1981) (Powell, J., dissenting). Similarly, there are many variations within the open and blanket primary states.

9. The open primary is sometimes defined more narrowly to include only those primaries in which the " 'voter is not required to declare publicly a party preference or to have that preference publicly recorded.' " *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 112 n.4 (1981) (citation omitted). Approximately ten states have this kind of open primary. *See* Pls.'

(Cont'd)

Finally, four states have blanket or nonpartisan primaries. The blanket primary is a version of the open primary in which the voter is not limited to the ballot of any single party. All voters receive the same ballot, and a voter is not limited to the candidates of any single party but may vote, as to each office contested, for any candidate regardless of party affiliation. This is the primary system in Washington and Alaska, and is the system adopted by Proposition 198. Alaska first adopted a blanket primary in 1947 and has had a blanket primary since that time with the exception of the period from 1960 to 1966 when it adopted a traditional open primary. Washington has had a blanket primary continuously since 1935. Finally, Louisiana has a version of a blanket primary, a nonpartisan primary open to all registered voters. Similar to the blanket primary in the sense that a voter can vote for any candidate without regard to party affiliation and is not limited to one party's nominees, the nonpartisan primary differs because "[t]he two top vote receivers, regardless of party, meet in a subsequent (runoff or general) election." *Id.* at 3.

"The relative merits of closed and open primaries have been the subject of substantial debate since the beginning of this century and no consensus has as yet emerged." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 222 (1986). It

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(Cont'd)
Ex. 7, *Costantini Report* at 3; *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 222 n.11 (1986). The other states follow practices that are sometimes classified as "semi-open" or "semi-closed." In these states the voter is permitted to request any party's ballot the day of the primary, but some record of the request is made or a public statement of party affiliation is made prior to voting.

is apparent from this very case that the States continue to debate the question and to try new approaches.[10]

All of the four political party plaintiffs in this case have bylaws that prohibit persons who are not registered in their parties from voting in their parties' primary. Article X, § 8 of the By-Laws & Rules of the California Democratic Party states that "No person shall be entitled to vote for a Democratic candidate at a partisan primary election unless he or she is a registered Democrat." Pls.' Ex. 1 at 36. The Republican Party also disputes the legitimacy of an open or blanket primary: "The [State Central] Committee shall recognize only those partisan nomination processes under California law that limit the electorate for partisan nomination elections to registered Republican voters, and which do not impose upon the Committee, without its express concurrence, a nomination process open to voters registered in other parties or as decline to state." Defs.' Ex. S at 2. The Peace & Freedom Party State Central Committee By-Laws

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10. When the Supreme Court decided *Tashjian* in 1986 it found that 21 states provided for the classic closed primary. According to Professor Gerber, as of 1990 the number of closed primaries had fallen to sixteen, including California. *See* Defs.' Ex. E., *Gerber Report*, at 2. Because it is not easy to classify the differing systems and because analysts use somewhat different definitions of the "closed" and "open" primaries, this change in numbers may be more the product of differing classification systems than changes in the states' election laws. The *Tashjian* Court also found that four states, including Virginia, had blanket primaries. The inclusion of Virginia as a blanket state appears to have been in error. *See* Va. Code § 24.1-182 ("No person shall vote for the candidates of more than one party.").

and the Libertarian Party of California Bylaws have similar provisions. *See* Pls.' Ex. 3 at 6, and Ex. 4 at 13.[11]

The California Democratic Party, the Peace and Freedom Party, and the Libertarian Party of California and certain of their officers brought this action against the Secretary of State of the State of California seeking a declaration that Proposition 198 is unconstitutional and requesting an injunction against its implementation.[12] The California Republic Party and certain of its officers intervened as plaintiffs. Californians For An Open Primary intervened as a defendant.[13] The court heard testimony over four days and has received numerous exhibits, including the reports of various experts.

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11. The Democratic National Committee's charter requires that state party delegates to the national convention be chosen through "processes which . . . restrict participation to Democrats only." Pls.' Ex. 2 at 2 (Art. 2, § 4(e)). *See also* Pls.' Ex. 9 at 4 (Rules 2.A. and 2.B. of the Delegate Selection Rules). The Rules of the Republican Party have a similar rule against blanket and open primaries. *See* Defs.' Ex. T at 25 (Rule No. 34(f)).

12. It appears that the political parties did not mount a campaign against Proposition 198 with the voters at the time of the election. *See* R.T. at 230; *Nader v. Schaffer*, 417 F. Supp. 837, 850 (D. Conn. 1976), *aff'd without opinion*, 429 U.S. 989 (1976) (criticizing plaintiffs for "seeking a change in the law by judicial fiat" rather than by political activity).

13. For ease of reference, throughout this opinion the terms "plaintiffs" and "defendants" shall include the intervenors, and when the political "parties" are referred to as taking a position in this action, the term shall include the individual officers who are also plaintiffs.

II.

This case presents two competing views as to the function of the direct primary and, to some extent, as to the function of the political parties. From the parties' perspective, the parties are autonomous organizations and the primary is their opportunity to select their leaders and to define their positions on political questions. From the defendants' perspective, the primaries are the first step by which the electorate as a whole, regardless of party affiliation, chooses its leaders, and the political parties, as they operate to frame the choice of candidates, are a part of a highly regulated governmental activity — the election process. Both positions find support in the Constitution and the relevant case law. The "freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986). "As a result, political parties' government, structure, and activities enjoy constitutional protection." *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364, 1369 (1997). However, the States also have a strong interest in the conduct of elections. "[T]he Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Tashjian*, 479 U.S. at 217. It is the clash of these two constitutionally rooted interests that must be resolved in this case.

The Supreme Court has never directly considered the constitutionality of a blanket or open primary. In *Democratic*

Party of the United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (1981), the Court had the opportunity to decide the constitutionality of Wisconsin's open primary but decided the case on a different basis, merely noting that the State Supreme Court had concluded that the "open primary serves [a] compelling state interest" and that "[u]pon this issue, the Wisconsin Supreme Court may well be correct." *Id.* at 121.[14] Perhaps the closest case is *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), but in *Tashjian* the Court addressed the reverse of the situation presented here; in *Tashjian* the state election law provided for a closed primary and the political party desired to open its primary to independent voters.[15] Thus, the Court had no occasion to

14. The Court viewed the issue as "whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party." 450 U.S. at 121. Justice Powell in dissent would have held that the open primary was supported by compelling interests that outweighed the burden on the National Party. *Id.* at 126. Justice Powell's dissent, like Justice Abrahamson's opinion for the Wisconsin Supreme Court, discusses many of the issues relevant to this case.

15. The Court expressly cautioned that its holding was limited to the particular set of circumstances before it. *Id.* at 554 n.13 ("Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership."). *Nader v. Schaffer*, 417 F. Supp. 837, *aff'd without opinion*, 429 U.S. 989 (1976), also addressed the constitutionality of a closed primary. The court held that the State's closed primary was constitutional in the face of a challenge from two voters who wanted to vote in the primary elections without registering with a party. The court concluded that the closed primary was reasonably related to the legitimate goal of protecting the associational rights of party members.

address either the State's interests in an open or blanket primary or the burdens imposed on a political party by such a primary system. Two State Supreme Courts — the Supreme Courts of Alaska and Washington — have examined the constitutionality of the blanket primary and both have concluded that a blanket primary withstands a party's First Amendment challenge. *See O'Callaghan v. Alaska*, 914 P.2d 1250 (Alaska 1996), *cert. denied*, 117 S. Ct. 1690 (1997); *Heavey v. Chapman*, 93 P.2d 1256 (Wash. 1980); *Anderson v. Millikin*, 59 P.2d 295 (Wash. 1936). As noted above, the Supreme Court of Wisconsin came to the same conclusion concerning the Wisconsin open primary in the face of the Democratic Party's claim that by permitting non-party members to vote in its primary, including Republicans and adherents of other parties, the State's open primary violated the Party's associational rights. *See Wisconsin ex rel. La Follette v. Democratic Party*, 287 N.W.2d 519 (Wis. 1980).

The Supreme Court recently has explained the standard and manner of review that should be applied when a state election law is challenged by a political party on the basis of the First Amendment:

> When deciding whether a state election law violated First and Fourteenth Amendment associational rights, we weigh the " 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly

> tailored and advance a compelling state interest. Lesser burdens, however, trigger less-exacting review, and a State's " 'important regulatory interests' " will usually be enough to justify " 'reasonable nondiscriminatory restrictions.' " No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.

Timmons v. Twin Cities Area New Party, 117 S. Ct. 1364, 1370 (1997) (citations omitted). In describing the "flexible" balancing test now used by the Court, the Ninth Circuit has cautioned that even when "strict scrutiny," the highest standard of review, has been invoked, "its invocation in election law cases has not preordained their outcome." *Lightfoot v. Eu*, 964 F.2d 865, 869 (9th Cir.1992). Moreover, the Court does not require "elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons*, 117 S. Ct. at 1372.

In evaluating the constitutionality of Proposition 198, the court therefore must first determine the character and magnitude of the burdens imposed by the blanket primary on the associational rights of the political parties. The court then must consider the State's interests and weigh the strength of those interests against the particular burdens placed on the parties' associational rights. The greater the intrusion on the parties' associational rights, the greater must be the State's interests and the more narrowly tailored must be the Proposition to advance those interests.[16]

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16. Defendants stress an argument that must be addressed at the outset. Defendants argue that because a majority of the members (Cont'd)

III.

The parties' main argument is that a blanket primary permits voters who are not members of a particular party — who may indeed be hostile to that party's electoral interests — to vote in that party's primary and thus to participate in

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(Cont'd)
of the Democratic and Republican parties, and presumably of the minor parties, voted for Proposition 198, the membership of the parties have consented to Proposition 198 and therefore there is no issue for the court to resolve. There are three problems with this argument. First, even though the polls appear to be accurate, those polls do not report the votes of minor party members. It is only by inference that it can be concluded that minor party members also supported Proposition 198. Moreover, and second, even if the polls are accurate, this is not the way in which decisions customarily are made in our democracy. In no other context do we accept the results of polling for the act of voting. Finally, the parties have selected certain procedures for the modification of their rules. These procedures require deliberation and decisionmaking by the parties' respective central committees. Other deliberative bodies have similar procedural rules. Such rules may affect the nature of the debate — indeed, may cause there to be debate — and may affect the outcome of the decision. We would not accept a poll of legislators as the equivalent of a legislative vote. For much the same reason, a poll of voters is not the equivalent of a decision by a party according to the procedural rules of the party. The court therefore rejects the argument that the "parties," defined as the electorate, have agreed to Proposition 198 and that this lawsuit is merely an attempt by dissidents to carry on intra-party disputes that they previously lost at the ballot box. For an interesting discussion of "who gets to speak for 'the party'," see Daniel H. Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry* 71 Tex. L. Rev. 1741, 1777 (1993).

the process by which the party defines its positions on a variety of issues and by which it chooses its standard bearers. In *Tashjian* the Supreme Court recognized the importance of these interests in invalidating a Connecticut statute that forbade the parties from permitting non-members from voting in their primaries:

> [T]he freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.' . . . The statute here places limits upon the group of registered voters whom the Party may invite to participate in the 'basic function' of selecting the Party's candidates. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.

Tashjian, 479 U.S. at 215-16 (citations omitted). *Accord Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364, 1370 (1997) ("the New Party, and not someone else, has the right to select the New Party's 'standard bearer' ").

A.

The parties contend that their interest in limiting candidate selection to their own members is so great that no matter what the State's interest and no matter how Proposition 198 will work in practice, the blanket primary must be unconstitutional on its face. Yet while the interest

in determining who will vote in a party's primary is one protected by the First Amendment, and is undoubtedly an important interest, this is not the end of the inquiry. If it were, then open primaries would also be unconstitutional upon any party's objection: an open primary, every bit as much as a blanket primary, permits voters who are not registered in a party to vote in that party's primary. But many of the States have some version of an open primary and to invalidate them all on this theoretical ground would be an extraordinary intrusion into the complex and changing election laws of the States and would remove from the American political system a method for candidate selection that many States consider beneficial and which in the uncertain future could take on new appeal and importance.[17]

Similarly, were the parties' power to determine membership and to select their nominees unfettered, then the States would also lack power to prescribe candidate selection through a primary election or to require that all voters who have met a State's registration requirements be

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17. The expert witnesses in this case differ as to how many of the States have open primaries or some feature of an open primary. Part of this dispute depends on how to classify those States that treat a voter's request for a ballot as tantamount to a declaration of party affiliation. Even if this patent fiction were accepted, close to half of the States permit voters who are not members of a particular party, and who may be independent or, in some States, members of other parties, to vote in that party's primary election. Moreover, as Justice Powell noted, when a voter may register immediately before voting at the primary, "the difference between open and closed primaries loses its practical significance." *Democratic Party*, 450 U.S. at 132 (Powell, J., dissenting).

permitted to vote in the parties' primaries notwithstanding any other membership requirement that a party might impose.[18] However, the States have considerable regulatory authority over the process of candidate selection and may require that the parties select their candidates by a primary election open to registered voters. *See Lightfoot v. Eu*, 964 F.2d 865, 871 (9th Cir. 1992) ("political parties' rights to nominate whomever they want, however they want, is not sacred"); *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364 (1997) (State can prohibit fusion candidacies). The States' authority over the political parties stems in part from the Constitution, Art. I, § 4, cl. 1, and in part from the public function that the political parties perform in the candidate nominating and political processes.

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18. The most dramatic example of government control of a political party's membership requirements are the White Primary Cases in which the Supreme Court held that the Democratic Party of Texas could not exclude black voters from its primary. *See Smith v. Allwright*, 321 U.S. 649 (1944). An interesting example of how a party's desire to limit its membership could conflict with state law is suggested by the testimony of plaintiff Gail Lightfoot, a member of the State Executive Committee of the Libertarian Party: "You become a member of the Libertarian Party by joining, by asking. It's a request to become a member. And you pay dues and sign a pledge [of nonviolence]. In California, because of state law, state law says that all registered voters that take the name Libertarian are members of the party. But we consider pledge-signing individuals who have paid their dues and signed the pledge to be the true members of our party." R.T. at 153-54; *see also* R.T. at 179 (Peace and Freedom Party confers party membership on persons who are "deprived of the right vote by the State of California because of age, citizenship, or prior social behavior").

Moreover, the analogy on which the parties rely so heavily, the analogy between the political parties and the myriad of private political, charitable, recreational, educational or religious associations at the center of American life, is imperfect at best. The political scientists who testified in this case agree that a political party cannot be described simply as a private club or association; instead, a political party has three distinct aspects — the party in the electorate, the party organization, and the party in government.[19] Unlike other private associations, at least in one of their avatars — the party in government — the political parties are very like the government itself. *See* Lowenstein, *supra*, at 1757 ("unlike any other private groups, political parties routinely, pervasively, and legitimately exercise their influence from within the government"). And the parties perform functions that are fairly characterized as governmental in nature, such as the nomination of candidates.

Furthermore, at least the major political parties lack the unity of purpose and cohesive membership characteristic of most private organizations. The major political parties in this

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19. *See* Pls.' Ex. 6, *Cain Report*, at 15 ("Since the seminal work of the scholar V.O. Key, parties are thought to consist of three components: the party in government, the party in the constituency and the party as organization."); Lowenstein, *supra*, 71 Tex. L. Rev. at 1760 (1993) ("Although there have been a great many typologies of the varying 'locations' and functions of parties, probably the most common identifies three: the party in the electorate, the party organization, and the party in or running for public office . . . The very fact that references to 'the Democrats' and 'the Republicans' are more common in ordinary conversation than references to 'the Democratic party' and 'the Republican party' testifies to the loose and manifold nature of our concept of 'party.' ").

country " 'have been characterized by a fluidity and overlap of philosophy and membership.' It can hardly be denied that [the parties] generally [have] been composed of various elements reflecting most of the American political spectrum." *Democratic Party*, 450 U.S. at 133 (Powell, J., dissenting) (citations omitted). And, as discussed above, the term "party member" as applied to registered voters is something of a misnomer. The States determine who will vote at primary elections — registered voters. *See* Cal. Elections Code §§ 2151, 7164, 7362, 7804, 8001. These voters have not allied themselves to a political party in the customary way that one normally becomes a member of a private association; they have not paid dues, taken an oath, expressed agreement with certain ideals or goals, attended meetings, accepted any obligations, or attended upon any other rite of initiation. The parties do not and could not insist upon more than mere registration as the price of voting in the primary elections.[20]

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20. "[T]he essence of the legal definitions of party membership in the United States will surely continue to be self-designation. The fact remains that today even in Illinois, New York, or any other closed-primary state you are a Democrat if you say you are; no one can effectively say you are not; and you can become a Republican any time the spirit moves you simply by saying that you have become one. You accept no obligations by such a declaration; you receive only a privilege, the privilege of taking an equal part in the making of the party's most important decision, the nomination of its candidates for public office. The only remaining restriction is that in some states, such as California, you may have to let the registrar of voters know that you have changed parties, and you may have to do so several weeks or even months before your new party's next primary. But in many closed-primary states you do not even have to do that, and in Wisconsin and the other open-primary states you are

(Cont'd)

Thus, to contend that Proposition 198 permits non-party members to vote in a party's primary, while accurate, covers over much of the imprecision in the political reality.

In short, it is necessary to look beyond the parties' claim that their constitutional interest in limiting candidate selection to their respective members necessarily prevails over any State interest and without regard to how the voters may behave under a blanket primary.

B.

Turning to the more practical implications of a blanket primary, the parties contend that a blanket primary process in California will have a destructive effect on all political parties both major and minor. The parties predict that there will be widespread cross-over voting, whether benevolent or malicious, and that the consequences of this large cross-over vote will be many and adverse to the parties. The parties contend that the cross-over vote, and the prospect of a large cross-over vote, will affect the selection and behavior of party nominees and elected officials; weaken party discipline; increase the costs of primary elections by causing candidates to compete as if it were a general election; dampen the morale of party activists; and disrupt internal party structure and governance.

(Cont'd)
not allowed to make an official declaration of your party membership. One can only conclude that the so-called 'closed' primaries are just a hair more closed than the so-called 'open' primaries." A. Ranney, *Curing the Mischiefs of Faction* 166-67 (1975), *quoted in Wisconsin ex rel. LaFollette v. Democratic Party*, 287 N.W.2d at 510.

Appendix B

Much of the testimony at trial was directed to the question of whether voters in blanket primary states tend to cross over in sufficient numbers to influence the outcome of elections and whether they cross over for benevolent or malevolent reasons. A cross-over voter is one who votes for a candidate of a party in which the voter is not registered. Thus, the cross-over voter could be an independent voter or one who is registered to a competing political party.[21] A cross-over voter may be actuated by three different purposes. First, the voter's purpose may be to vote for the voter's most preferred choice to win in the general election; this kind of cross-over voter is sometimes referred to as engaging in "sincere" voting. Second, the voter may be engaged in "strategic" voting, designed to obtain the best possible outcome, by voting for the voter's second choice in a setting where the voter's first choice, within the voter's own party, either has no apparent chance of victory at the general election or is so certain to win the party's nomination that the voter perceives that his or her vote is best spent influencing another party's primary and thus the choice at the general election. Finally, the voter may be a raider, crossing over to vote for a candidate who is perceived as the "weakest" of an opposing party's candidates in the hopes that this candidate will win the primary only to be trounced at the general election.[22]

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21. Some of the experts exclude independents from their definition of cross-over voters.

22. A sophisticated raider will vote for the weakest among those candidates who have a realistic chance of prevailing at the primary.

Appendix B

The parties contend that a blanket primary will unleash a torrent of cross-over voting even by comparison to open primaries. The parties reason that unlike an open primary, a blanket primary permits a voter to cross over as to particular contested elections without losing the ability to vote in the remainder of the contests in the voter's own party. The evidence at trial suggests that the parties are correct that cross-over voting will be more prevalent after Proposition 198. Indeed, defendants can hardly dispute this point while maintaining that the State's interests are furthered by a blanket primary precisely because it facilitates cross-over voting. Nonetheless, the parties' characterization of the likely amount or effects of cross-over voting due to a blanket primary is overdrawn.

To begin with, there is little evidence that raiding will be a factor under the blanket primary. On this point there is almost unanimity among the political scientists who were called as experts by the plaintiffs and defendants. Professor Costantini, for plaintiffs, gave his opinion that

> [s]urvey evidence tends not to support any fear that raiding (sometimes characterized as "mischievous voting") will be a common phenomenon under Proposition 198. At least in open presidential primaries (the focus of almost all the relevant studies), it appears that the great majority of crossover voters — from 90% to 95% or more — invade a party's primary to vote for a preferred candidate and not to vote for a candidate who they will oppose in the general election and who they believe will be easier to defeat in that election.

Appendix B

Pls.' Ex. 7, *Costantini Report*, at 7; R.T. at 485-86. Professor Donald Olson of the University of Washington-Seattle, reflecting on the over half century of experience with a blanket primary in Washington, explained that the conditions for successful raiding rarely exist:

> The potential for raiding under the blanket primary generates wide media attention and spawns electioneering lore that is simply unwarranted by actual experience. Technically defined, raiding would occur where partisan voters of party X cross-over in sufficient numbers to help select the weakest or most vulnerable candidate in party Y. The requirements for this form of electoral subterfuge are: 1) the absence of a meaningful primary contest in party X; 2) provision of sufficient information to identify the weaker and most vulnerable potential opponent in party Y; 3) concerted action by a large enough bloc of voters in party X to influence the outcome in the primary of party Y; and 4) the abandonment of traditional party loyalties by partisan voters to enter the opponent's primary.
>
> In the experience of Washington state, these requirements are simply too demanding and have not been fulfilled in actual practice.

Defs.' Ex. G, *Olson Report*, at 6. *See* Pls.' Ex. 6, *Cain Report*, at 6-7; R.T. at 355. Given that the purpose of raiding is to weaken a competitive party's advantage at the general election, raiding is not a concern for minor parties because their candidates rarely have a chance of prevailing at the general election. Indeed, no conclusive instance of raiding

Appendix B

in such numbers as to affect the outcome of any primary was offered by plaintiffs.[23]

As to benevolent cross-over voting, the evidence suggests that there will be particular elections in which there will be a substantial amount of cross-over voting — perhaps as high as 25% of the vote for that office — although the cross-over vote will rarely change the outcome of any election and in the typical contest will not be at significantly higher levels than in open primary states. There will be a small number of elections in which the cross-over vote proves decisive, and there will be other elections in which the possible importance of the cross-over vote will be an influence on the conduct of the primary campaign and the conduct of elected officials.

The experience in Washington suggests that as to the election for any particular office, approximately 10% of the voters are cross-over voters, excluding independents, while in some exceptional cases this figure may rise as high as 20-25%. R.T. at 511.[24] Typically the cross-over vote in Washington does not change the result of an election but

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23. Professor Cain suggests that the 1974 Alaska Gubernatorial Republican primary may be an example of raiding in which Democrats and Independents "raided" to support liberal Republican Jay Hammond over former Governor Walter Hickel. However, as Professor Cain notes, the cross-over voters may have been "liberal shoppers" as opposed to saboteurs. *See* Pls.' Ex. 6, *Cain Report*, at 7.

24. According to Professor Olson, approximately 25-33% of voters vote for candidates of only one party throughout the ballot, voting a straight ticket. The remainder of the voters cross over at least once.

only the margin of victory. R.T. at 513. Moreover, the amount of cross-over voting is greater in a blanket primary than an open primary but not dramatically so. According to Professor Nagler, who co-authored the most comprehensive study of patterns of cross-over voting presented at the trial, the average cross-over rate, excluding independents, is something on the order of 5% of voters in closed primary states,[25] 10% of voters in open primary states, and 11-15% in blanket primary states. R.T. at 780, 788; Defs.' Ex. H, *Alvarez and Nagler Report*, at 11-12. The study concludes that "crossover voting in blanket primaries is not dramatically higher than in other types of open primary systems" and that "there is very little crossover voting in general in primary elections in the United States." *Id.* at 35-36.[26]

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25. In a closed primary state, a cross-over voter is one who identifies with one party but decides to register in another party for the purpose of voting in the primary of that other party.

26. Plaintiffs fail to present substantial or convincing evidence that the minor political parties will be affected by cross-over voting to any significant degree. A strategic voter would not cross-over to vote in a minor party's primary because the victor of the minor party primary will not likely be the winner in the general election. Moreover, the minor parties rarely have contested primaries. R.T. at 167, 618, 630-31. Finally, the minor parties make much of their small turn-out at the primary election compared to the much larger numbers of voters who select their candidates at the general election. From this disparity, the minor parties argue that they will be swamped at the primary election by the same non-party members who vote for their candidates at the general election. This conclusion does not follow. Those non-party members who vote for minor party candidates at the general election are most likely voters whose preferred candidates were not selected in the primary of a major party. R.T. at 193.

Although cross-over voting typically does not change the outcome of a primary and may not be much greater in a blanket than in an open primary, it is probable over time that there will be some elections under Proposition 198 that will be decided by the cross-over vote. Cross-over voting is most likely to occur when one party's primary is competitive while the other party's primary is not. When this condition of "asymmetric competition" occurs, voters of the party with the noncompetitive primary may cross over to the other primary to influence the choice. The incentive to cross over will be particularly high if the winner of the other party's primary is almost certain to win at the general election. *See* Pls.' Ex. 6, *Cain Report*, at 8. Every two years in California there are 80 Assembly races, 20 State Senate races, and 52 Congressional races. Examining the 1996 Assembly primaries, Professor Cain identified ten races in which there were asymmetric competitive conditions. In some of these races, a cross-over rate of 5% could have changed the outcome of the election had all of the cross-over voters voted for the same candidate. Given that in Washington, cross-over rates occasionally reach levels as high as 20-25%, and that the cross-over rate in California could be higher than Washington,[27] it is likely that in the fullness of time some California primary races will be decided by cross-over voters, even if the number of such occasions is not large. Depending on the circumstances, the swing of even one seat could give a legislative majority to one party.

Furthermore, the possibility of a decisive cross-over vote — whether or not that vote materializes — could well affect

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27. *See* R.T. at 574. Whether cross-over rates in California will be similar to those in the other blanket primary states is necessarily a matter of conjecture.

the conduct of elections and elected officials. Under a blanket or open primary, the primary election becomes similar to the general election. Candidates will perceive a need or opportunity to attract support from the entire electorate, not simply from members of their respective parties. This will affect not only the cost of the primary — which is likely to increase, *see* R.T. at 270 — but may affect the positions that candidates take on political issues as they seek to attract cross-over voters. Moreover, once elected, candidates may perceive that the cross-over vote makes them less vulnerable at the primary to the wrath of the party organization or party regulars for acts of apostasy. A blanket or open primary weakens the "disciplining effect" of the primary challenge in requiring "the officeholder [to] carry out the party philosophy and support the majority position of the party caucus." R.T. at 214. The corollary to this loss of discipline is a loss of power to party activists such that the ardor of party volunteers and activists may be dampened in a system that permits non-party members to exert influence over the party's selection of a candidate. This has been the experience in Washington and is likely to occur in California. *See* R.T. at 558; R.T. at 18; R.T. at 989-990.

Finally, the parties argue that their internal governance will be disrupted by the blanket primary and the cross-over vote. Although Proposition 198 specifically exempts party committee positions from the blanket primary, both the Republican and Democratic Parties permit officeholders and nominees to appoint members of their governing bodies, the Democratic State Central Committee and the Republican State Central Committee. Because nominees may have been selected by non-party members, and because the nominees

in turn choose members of the Central Committees, the parties contend that their governing body may be adulterated. Further, the parties warn that their respective national organizations may not accept the results of the California presidential primary, if that primary is a blanket primary, with the result that the parties may be forced to hold a nominating convention or caucus. Neither of these contentions is particularly forceful, however. As to membership on the Central Committee, the parties are free to change their selection process if they wish. Moreover, both parties already give more positions on the Central Committee to successful candidates; yet these successful candidates are precisely those who have appealed more broadly across party lines. R.T. at 9, 224. As to the national nominating conventions, the California parties may be forced to adopt a different procedure for delegate selection other than the presidential primary or they may receive a waiver from their national organizations such as Wisconsin eventually received from the Democratic Party. R.T. at 123, 145. This is a choice for the parties to make, and they can do so as they please without interference from the State.

C.

The magnitude of the burdens imposed on the parties by Proposition 198 are not fairly characterized either as "severe" or as "negligible," the two labels most often applied in the caselaw at this juncture of the analysis. The burdens are not negligible. State law requires each party to select its candidate through a primary, and the winner of the primary will be the party's nominee. The blanket primary wrests a measure of control of the primary process from the party

and its members. This is its purpose. The party may still endorse a candidate and may throw financial support to a particular candidate. And, in the typical election, the cross-over vote will not be decisive. Yet by permitting non-party members to vote in a party's primary — even granting the uncertainty of the label "party member" — Proposition 198 is an intrusion on a party's traditional right to select its own candidate. In this respect, the blanket primary is no different from an open primary although the practical effect of a blanket primary on the selection process may be somewhat greater than an open primary. In addition, a blanket primary, like an open primary, may depress the vigor and morale of party activists and may affect the ability of the party to discipline errant legislators.

On the other hand, the burdens on the parties due to Proposition 198 are not likely to prove severe or debilitating. The Washington experience, as well as that of the many open primary states, suggests that Proposition 198 will not diminish the efficacy or strength of the political parties in California by any substantial degree.[28] Indeed, a study of the political parties in the 1970's and 1980's in 13 western states, including Washington and California, concluded that the political parties in Washington were the most competitive with one another of all 13 states. R.T. at 524; *see Tashjian*, 479 U.S. at 223 n.12 ("dire" predictions as to decay of parties not borne out by the 29 States that have open primary features). Both the Democratic and Republican Parties

28. Professor Cain would not expect a blanket primary to be so debilitating to the parties that it should be removed as an option altogether even if the parties were in favor of it. R.T. at 457. Professor Cain's greatest concern is to protect party autonomy.

continue to be strong political parties in Washington, and can be expected to operate with little diminution in their effectiveness in California.[29] The parties do not show that the blanket primary is significantly different theoretically or practically from the open primary. Nor do they show or even contend that Proposition 198 has any discriminatory purpose or effect. Thus, the burden imposed by a blanket primary falls evenly on all of the parties whatever their size or ideology. Finally, Proposition 198 leaves untouched the wide field of party endeavor that is not directed specifically to the primary, activities such as developing the party platform, registering new voters, and getting out the vote on election day. Defs.' Ex. I, *Quinn Report* at 18.

In light of all of these considerations, the court finds that the parties have succeeded in showing that the blanket primary imposes a significant but not severe burden on their associational rights. To survive the challenge mounted by plaintiffs, Proposition 198 must be supported by interests that are sufficient to outweigh the burdens identified above. Those interests need not be compelling, given that the burdens are not crushing, but they must be important.

29. According to Professor Olson the Washington Republican Party has been ranked as among the strongest Republican parties in the nation. Professor Olson states that the Washington Republican Party "is alive, it is healthy, it is well, it is vigorous. It is the single most important institution for recruiting candidates to run for office. It's the single most important institution for endorsing candidates. It is the most important fundraising institution in the conduct of elections." R.T. at 527. According to Professor Olson although the Washington Democratic Party is not so dynamic as its competitor, it is still of above average organizational strength as compared to the Democratic parties of the 50 states. R.T. at 528.

IV.

The States have broad regulatory authority over the conduct of elections including primaries.[30] The primary election is the critical first stage in the electoral process: "The direct primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers." *Storer v. Brown*, 415 U.S. 724, 735 (1974). "As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations [by the political parties] have been made." *Morse v. Republican Party*, 116 S. Ct. 1186, 1199 (1996) (citation omitted).

Proposition 198 is the latest development in a history of political reform measures that began in the Progressive Era. "The Progressives believed democracy should be something greater than competition between political parties." *Lightfoot v. Eu*, 964 F.2d at 872. The Progressives sought to diminish the importance of the parties and "party bosses" by establishing nonpartisan local elections, a comprehensive civil service system, direct legislation through the initiative

30. "[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates." *Storer v. Brown*, 415 U.S. 724, 729-30 (1974).

and referendum, and the cross-filing system by which members of one party could run in the primary of the other party. *See* Defs.' Ex. I, *Quinn Report*, at 7 (quoting J. Owens and E. Costantini, *California Politics and Parties* (1970)).[31] The cross-filing system is of particular note because in practice it bore some resemblance to a blanket or nonpartisan primary system.[32]

31. Lowenstein contrasts the Progressives' "vision of a democracy purged of corruption by placing widely dispersed power in the hands of common men and women" with the views of "party renewal advocates" who believe in autonomous, strong, cohesive political parties who engage in "responsible party government" much on the European parliamentary model. *See* Lowenstein, *supra*, 71 Tex. L. Rev. at 1761-71, 1791. The debate in this case has been framed by the experts in similar terms.

32. Under the cross-filing system, "[a] candidate registered in one party may seek the nomination of all parties at the primary. If he fails to secure the nomination of his own party, he cannot be the candidate of any party at the general election." *Jones v. McCollister*, 159 Cal. App. 2d 708 (1958). Under the cross-filing system voters registered to different parties had the opportunity to vote for the same candidates. According to Dr. Quinn, as the system worked in California, the winner of one party's primary tended to be the winner of the other party's primary as well:

> The cross filing system existed in California from 1911 to 1959. Under this system, a legislator or member of congress could file to run in both the Democratic and Republican primaries, and so long as he or she won their own party nomination, they would win the nomination of the other party as well. . . . On the general election ballot, the winners, usually incumbents, are shown as the nominees of both parties.

Defs.' Ex. I, *Quinn Report*, at 7.

Defendants advance a number of State interests furthered by Proposition 198. All of the various interests, however, reduce to one fundamental contention: according to defendants, Proposition 198, like other Progressive Era reforms, enhances the democratic nature of the election process and the representativeness of elected officials.

Defendants stress that a blanket primary opens up the candidate selection process to two types of arguably "disenfranchised" voters — independents and minority party voters in safe districts. In a blanket primary, independent voters will be able to participate in framing the choice that they will ultimately have to make in the general election. Approximately 11% of the electorate in California are registered as independents, and the proportion of independent voters is growing rapidly. R.T. at 940. Moreover, many California voters reside in "safe districts," districts in which one party is dominant.[33] Voters in these districts who belong to the minority party have no influence or voice because the general election is decided as a practical matter in the primary of the dominant party. Of 15.6 million registered voters in California, approximately one quarter are "disenfranchised" in this way. R.T. at 854. Defendants suggest that the inability of these voters to influence the outcome of the election in their districts leads to the election of representatives who

33. According to Dr. Quinn, "A district could be considered safe if it had not been contested between the parties since it was created in the 1991 reapportionment; the area covered had been historically one party in its voting . . . ; there was no significant money spent in the election between the two parties in '94 and '96 . . . ; and if the incumbent received more than 55 percent of all of the votes cast in the election." R.T. at 847-48.

see no need to represent these voters or to pay heed to their interests. Of course, such voters could register in the majority party, but this would require them to give up their current party or independent registration.

Apart from the exclusion of independents and minority voters in safe districts, defendants contend that the closed primary gives undue power to party members and loyalists, including incumbent elected officials, such that the voters in the general election are presented with candidates who are more partisan and who take positions on the policy issues of the day that are not representative of the majority of the electorate. *See* R.T. at 243, 269, 299, 857. Defendants note that turnout is low at primary elections, and thus that a minority of more partisan party members, influenced by the endorsements of party leaders, determine the choice for the much larger group of all voters at the coming general election. Defendants suggest that this skewing of the process toward partisan candidates leads to legislative impasse and thus alienation of the electorate from the political system. Defendants contend that candidates who would command majorities at the general election are unable to prevail at the primary such that the voters at the general election are forced to pick among candidates none of whom is the first choice of the majority of voters. R.T. at 255-256. Although these assertions are not readily susceptible of proof, many are not contested,[34] or are supported by persuasive opinion evidence

34. There is some evidence that elected officials from blanket primary states are closer to the views of the electorate as a whole than officials from closed primary states. *See* Defs.' Ex. E, *Gerber Report*, at 11. Some of plaintiffs' experts apparently would agree

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from defendants' experts. *See, e.g.*, R.T. at 954-963, 974-975. Furthermore, these contentions are clearly stated in the ballot pamphlet, and it is a fair inference from the margin of support that the people of California agree that a blanket primary system will lead to the election of more representative "problem-solvers" who are less beholden to party officials and "special interest groups." While political scientists may disagree on the question of whether the political system is benefitted when parties are more or less distinct or polarized, it is apparent that the voters have sided with less partisanship in adopting Proposition 198.[35]

Defendants also argue that representativeness and democratic participation are benefitted by the higher voter participation expected in a blanket primary election. Voter participation in primary and general elections in California has declined markedly over the past two decades. R.T. at

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that candidates selected in a blanket primary are likely to take less partisan or extreme positions than those selected in a closed primary. They do not concede that this is healthy, however, because they believe that the system is benefitted by greater partisanship and greater distance between the parties.

35. There is some suggestion in defendants' brief that the blanket primary will also make the parties more representative and therefore will benefit and strengthen the political parties. Defs.' Post-Trial Brief at 45. The Supreme Court has given little weight, however, to State interests couched in terms of what is good for the parties. The Court has found that it is for the parties to decide what is in their interest. *See Tashjian*, 479 U.S. at 222-24; *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 227-28 (1989).

658. Turnout rates in blanket primary states have been higher than in California, and there is reason to expect that by providing more choice, the blanket primary may encourage more voters to participate at the primary election. Similarly, defendants contend that elections will be more competitive under the blanket primary, again leading to an increase in voter interest and participation. Although the empirical case for the assertion that blanket primaries are more competitive than other primaries is not conclusive, there is reason to expect some increase in the number of candidates, the closeness of elections, and, therefore, voter turnout.

Finally, defendants point to one interest — voter privacy — that does not fit neatly under the representativeness or participation headings, although it is possible that greater privacy could lead to greater participation. Defendants note that a blanket primary protects voter privacy by permitting voters to participate in the primary election without publicly declaring a party affiliation as is the case in closed primary states and in some open primary states.

V.

Taken as a whole the State's interests that support the blanket primary are substantial, indeed compelling. There is a "substantial state interest in encouraging compromise and political stability, in attempting to ensure that the election winner will represent a majority of the community." *Storer v. Brown*, 415 U.S. 724, 729 (1974). In attempting to reduce partisan strife, Proposition 198 is similar to other measures adopted by the States to deal with the problem of factionalism, a problem that deeply troubled the framers of

the Constitution. *See The Federalist No. 10* (Madison). A State's interest in ameliorating "unrestrained factionalism" is a compelling one. Increasing the representativeness of elected officials, giving voters greater choice, and increasing voter turnout and participation in the primary process are all interests of the first order. *See Lightfoot v. Eu*, 964 F.2d 865, 872 (9th Cir. 1992) (State's interest in a direct primary is compelling). The voters' belief in the fairness of the electoral process is also a substantial state interest; it is apparent that the voters of California believe that the system is fairer when all voters, including independents and regardless of party affiliation, may participate in framing the choice of candidates at the general election. And while the parties argue that there are other ways to increase voter turnout, the fundamental goal of enhancing representativeness by providing all voters with a choice that is not predetermined by party members alone can only be advanced by the blanket primary. Unlike *Tashjian* in which the Democratic Party controlled the legislature and attempted to tell the Republican party who could vote in its primary, and where the State's purported interest in a closed primary was to protect the parties from disruption from without, Proposition 198 is a non-discriminatory measure that was adopted by a clear majority of voters, with a convincing margin from both major parties, and which advances interests that are uniquely those of the State and its electorate as opposed to the parties. These interests outweigh the also substantial interest that the political parties have in controlling who votes in the primary.

In reaching this conclusion, the court does not decide whether a blanket primary is a good idea; it may prove to be a bad idea, in which case the people of the State presumably

will act to reform the system in the future as they have in the past. Nor does the court decide whether the voters were correct in concluding that a more representative and participatory system is desirable at this time in the State's history or whether it is wise to weaken the parties by some degree to further the goals of representativeness and participation. These important questions are for the people of the State to decide.

Each of the States has its own experiment in democratic government. The history of election law is one of change and adaptation as the States have responded to the play of different political forces and circumstances. There is little reason to expect that the future will be any different. The court concludes that a blanket primary serves sufficiently weighty interests that the State of California should not be precluded from ever trying such a procedure.

Judgment is awarded to defendants.

IT IS SO ORDERED.

Dated: 24 November 1997

s/ David F. Levi
DAVID F. LEVI
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 4, 1999

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-17440
D.C. No. CV-96-02038-DFL

CALIFORNIA DEMOCRATIC PARTY; ART TORRES; KATHY BOWLER; PAUL JORJORION; PEACE AND FREEDOM PARTY; C.T. WEBER; LIBERTARIAN PARTY OF CALIFORNIA; GAIL LIGHTFOOT,

Plaintiffs-Appellants,

and

CALIFORNIA REPUBLICAN PARTY, MICHAEL SCHROEDER; SHAWN STEEL; DONNA SHALANSKY,

Plaintiffs-Intervenors,

v.

BILL JONES, Secretary of the State of California,

Defendant-Appellee,

v.

CALIFORNIANS FOR AN OPEN PRIMARY,

Defendant-Intervenor-Appellee.

Appendix C

No. 97-17442
D.C. No. CV-96-02038-DFL

CALIFORNIA DEMOCRATIC PARTY; ART TORRES; KATHY BOWLER; PAUL JORJORIAN; PEACE AND FREEDOM PARTY; C.T. WEBER; LIBERTARIAN PARTY OF CALIFORNIA, GAIL LIGHTFOOT,

Plaintiffs,

and

CALIFORNIA REPUBLICAN PARTY, MICHAEL SCHROEDER; SHAWN STEEL; DONA SHALANSKY,

Plaintiffs-Intervenors-Appellants,

v.

BILL JONES, Secretary of the State of California,

Defendant-Appellee.

ORDER

Before: HUG, Chief Judge, and B. FLETCHER and TROTT, Circuit Judges

All motions requesting that the court take judicial notice are denied. *See Ruiz v. City of Santa Maria*, 160 F.3d 543, 548 n.13 (9th Cir.1998)

Appendix C

The panel has voted unanimously to deny the petition for rehearing. Chief Judge Hug and Judge Trott vote to deny the petition for rehearing en banc and Judge B. Fletcher so recommends.

The full court has been advised of the petition for an en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

APPENDIX D — TEXT OF PROPOSED AMENDMENT TO THE ELECTIONS CODE

Proposition 198: Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure amends and adds sections to the Elections Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. This act shall be known and may be cited as the "Open Primary Act."

SEC. 2. Section 2001 is added to the Elections Code, to read:

2001. All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote, except as otherwise provided by law, at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation.

SEC. 3. Section 2151 of the Elections Code is amended to read:

2151. At the time of registering and of transferring registration, each elector may declare the name of the

political party with which he or she intends to affiliate at the ensuing primary election. The name of that political party shall be stated in the affidavit of registration and the index.

The voter registration card shall inform the affiant that any elector may decline to state a political affiliation, ~~but no person shall be entitled to vote the ballot of any political party~~ *and that all properly registered voters may vote for their choice* at any primary election ~~unless he or she has stated the name of the party with which he or she intends to affiliate~~ *for any candidate for each office regardless of political affiliation and without a declaration of political faith or allegiance*. The voter registration card shall include a listing of all qualified political parties.

~~No~~

Notwithstanding any provision to the contrary, no person shall be permitted to vote the ballot ~~of any party or for any delegates to the convention of any party~~ *for any elective political party central or district committee member* other than the party designated in his or her registration, except as provided by Section 2152.

SEC. 4. Section 13102 of the Elections Code is amended to read:

13102. (a) All voting shall be by ballot. There shall be provided, at each polling place, at each election at which public officers are to be voted for, ~~but~~ one form of ballot for all candidates for public office, ~~except that, for partisan primary elections, one form of ballot shall be provided for~~

~~each qualified political party as well as one form of nonpartisan ballot~~ *listing all candidates for public office*, in accordance with subdivision (b).

(b) At ~~partisan~~ *such* primary elections, each voter ~~not registered as intending to affiliate with any one of the political parties participating in the election~~ shall be furnished ~~only a nonpartisan~~ *an official primary* ballot. The ~~nonpartisan~~ *official primary* ballot shall contain ~~only~~ the names of all candidates for nonpartisan *and partisan* offices and measures to be voted for at the primary election. ~~Each voter registered as intending to affiliate with a political party participating in the election shall be furnished only a ballot of the political party with which he or she is registered and the nonpartisan ballot, both of which shall be printed together as one ballot in the form prescribed by Section 13207.~~

SEC. 5. Section 13203 of the Elections Code is amended to read:

13203. Across the top of the ballot shall be printed in heavy-faced gothic capital type not smaller than 30-point, the words "OFFICIAL BALLOT." However, if the ballot is no wider than a single column, the words "OFFICIAL BALLOT" may be as small as 24-point. Beneath this heading, in the case of ~~a partisan~~ *an official* primary election, shall be printed in 18-point boldfaced gothic capital type ~~the official party designation or~~ the words ~~"NONPARTISAN~~ *"OFFICIAL PRIMARY* BALLOT" ~~as applicable~~. Beneath the heading line or lines, there shall be printed, in boldface type as large as the width of the ballot makes possible, the number of the congressional, Senate, and Assembly district,

the name of the county in which the ballot is to be voted, and the date of the election.

SEC. 6. Section 13206 of the Elections Code is amended to read:

13206. (a) On the ~~partisan~~ ballot used in a direct primary election, immediately below the instructions to voters, there shall be a box one-half inch high enclosed by a heavy-ruled line the same as the borderline. This box shall be as long as there are columns for the ~~partisan~~ ballot and shall be set directly above these columns. Within the box shall be printed in 24-point boldfaced gothic capital type the words "Partisan Offices."

(b) The same style of box described in subdivision (a) shall also appear over the columns of the nonpartisan part of the ballot and within the box in the same style and point size of type shall be printed "Nonpartisan Offices."

(c) This section shall not apply to ballots for elective political party central or district committee members prepared in accordance with Section 13300.

SEC. 7. Section 13230 of the Elections Code is amended to read:

13230. (a) If the county elections official determines that due to the number of candidates and measures that must be printed on the ballot, the ballot will be larger than may be conveniently handled, the county elections official may provide that a ~~nonpartisan~~ ballot *for nonpartisan offices and*

measures shall be given to each ~~partisan~~ voter, together with his or her ~~partisan~~ *official primary* ballot, ~~and that the material appearing under the heading "Nonpartisan Offices" on partisan ballots, as well as the heading itself, shall be omitted from the partisan ballots~~.

(b) ~~If the~~ *Notwithstanding Section 13300, the* county elections official ~~so provides,~~ *shall provide that* the procedure prescribed for the handling and canvassing of ballots shall be modified to the extent necessary to permit the use of two ballots by partisan voters. The county elections official may, in this case, order the second ballot to be printed on paper of a different tint, and assign to those ballots numbers higher than those assigned to the ballots ~~containing partisan offices~~ *for nonpartisan offices and measures.*

SEC. 8. Section 13300 of the Elections Code is amended to read:

13300. (a) By at least 29 days before the primary *election*, each county elections official shall prepare ~~separate~~ *identical* sample ballots for each ~~political party and a separate sample nonpartisan ballot, placing~~ *voter, provided however, that in the case of ballots involving elective political party central or district committee members, each county elections official shall prepare separate ballots for the sole use of persons registered with that party, as provided for in Section 2151. On the official identical primary ballots, each county elections official shall place* thereon in each case in the order provided in Chapter 2 (commencing with Section 13100), and under the appropriate title of each office, the names *and party affiliations* of all candidates *organized randomly as*

provided in Section 13112 and not grouped by political party, for whom nomination papers have been duly filed with him or her or have been certified to him or her by the Secretary of State to be voted for in his or her county at the primary election.

(b) The sample ~~ballot~~ *ballots* shall be identical to the official ballots, except as otherwise provided by law. The sample ballots shall be printed on paper of a different texture from the paper to the used for the official ballot.

(c) ~~One~~ *Except as provided in Section 13230, one* sample *official primary* ballot ~~of the party to which the voter belongs, as evidenced by his or her registration,~~ shall be mailed to each voter entitled to vote at the primary not more than 40 nor less than 10 days before the election. ~~A nonpartisan sample ballot shall be so mailed to each voter who is not registered as intending to affiliate with any of the parties participating in the primary election.~~

SEC. 9. Section 13301 of the Elections Code is amended to read:

13301. (a) At the time the county elections official prepares sample ballots for ~~each political party at~~ the presidential primary, he or she shall also prepare a list *with the name* of candidates for delegates for each political party. The names of the candidates for delegates of any political party shall be arranged upon the list of candidates for delegates of that party in parallel columns under their preference for President. The order of groups on the list shall be alphabetically according to the names of the persons they

prefer appear upon the ballot. Each column shall be headed in boldface 10-point, gothic type as follows: "The following delegates are pledged to _____." (The blank being filled in with the name of that candidate for presidential nominee for whom the members of the group have expressed a preference.) The names of the candidates for delegates shall be printed in eight-point, roman capital type.

(b) Copies of the list of candidates for delegates of each party shall be submitted by the county elections official to the chairman of the county central committee of that party, and the county elections official shall post a copy of each list in a conspicuous place in his or her office.

SEC. 10. Section 13302 of the Elections Code is amended to read:

13302. The county elections official shall forthwith submit the sample *official primary* ballot ~~of each political party~~ to the chairperson of the county central committee of ~~that~~ *each political* party, and shall mail a copy to each candidate for whom nomination papers have been filed in his or her office or whose name has been certified to him or her by the Secretary of State, to the post office address as given in the nomination paper or certification. The county elections official shall post a copy of ~~each~~ *the* sample ballot in a conspicuous place in his or her office.

SEC. 11. (a) No provision of this act may be changed except by a vote of the people.

(b) The Legislature shall amend or delete other provisions of law not encompassed by this act which conflict

with the provisions herein in order to bring them into conformity with this act.

SEC. 12. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

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